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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.
75-494

OVERSEAS MOTORS, Inc., a Michigan corporation,

Petitioner

-vs-

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK GMBH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, Inc. (Porsche-Audi Division) a New Jersey Corporation, jointly and severally,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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September, 1975

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No.

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IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK GMBH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, Inc. (Porsche-Audi Division) a New Jersey Corporation, jointly and severally,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Overseas Motors, Inc., a Michigan corporation, prays that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on June 2, 1975 and on Order denying Rehearing, dated, July 10, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix I, p 5a. The opinion of the United States District Court for the Eastern District of Michigan appears in *375 F. Supp. 499.*

JURISDICTION

The order and judgment of the Court of Appeals on Petition for Rehearing en banc was entered on July 10, 1975. Appendix I, p 22a. The Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under *28 U.S.C.A. 1252 (1)* and pursuant to Supreme Court Rule 19 (1) (b).

QUESTIONS INVOLVED

1. Whether state of Ohio standards of sufficiency of evidence to withstand directed verdict are applicable in a treble-damage antitrust case tried in a District Court of the state of Michigan?

2. Whether the District Court for the Eastern District of Michigan and the Sixth Court of Appeals, in adopting the decision of the District Court, denied Petitioner the right to trial by jury under the Seventh Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT VII

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

STATEMENT OF FACTS

(Appendices attached hereto are designated Appendix I and Appendix II)

(The *Appendix* in *72-2198* (first appeal, on stay of arbitration, later consolidated with *74-1651*) is numbered 1a thru 103a and that numbering is adopted herein; the *Appendix* in *74-1651* runs from 104A and is distinguished by a capital A.

Reference to Petitioner's consolidated Brief will be referred to as *P-Br-1* and Petitioner's Reply Brief as *P-Br-2*. Overseas Motors, Inc. will be referred to as Petitioner; Audi NSU Auto Union Aktiengesellschaft, will be referred to as ANAU; Volkswagenwerk GMBH, will be referred to as *VW;* Volkswagen of America will be referred to as *VWOA;* and Import Motors Limited, Inc., will be referred to as *Import*. The Decision of the Court of Appeals for the Sixth Circuit, will be referred to as *DCA-6*.) The Decision of the District Court will be referred to as 375 F. Supp.

This action is brought by Overseas Motors, Inc., (Petitioner) against Audi NSU Auto Union Aktiengesellschaft (formerly NSU Motorenwerke, Aktiengesellschaft), (ANAU), Volkswagenwerk Aktiengesellschaft VW Volkswagen of America (VWOA), and Import Motors, Limited, Inc., (Import) Petitioner alleges violations of Section 1 and 2 of the Sherman Act, 15 USCA #1-7, 15 USCA 15, 15 USCA 18, Count 1; Section 7 of the Clayton Act, 15 USCA #18 (Count II); and Section 2 of the Automobile Dealers Day in Court Act, 15 USCA 1221-5.

The facts relevant to the question presented by this Petition, except for certain Binding Facts, are uncontroverted and may be introduced to the Court in a summary manner. It was agreed by the trial court and counsel for all the parties, that for the purpose of the Motion for Directed Verdict, all testimony and exhibits in this case were to be accepted and considered as admitted by the trial court. F. Supp 375 p 525; (Vol. 8 1508A, *Vol. 7-1329-1343A* (Vol. #7 - 1385-6A) (1447-8A). Thirty-five Binding Facts (Vol. 7 - 1486-8A) emanating from an Arbitration Award (Vol. #1 - 333-368A) were submitted to the trial judge, who screened out 24, but held that he and the jury were bound by eleven which could not be controverted, viz 1, 2, 5, 6, 7, 12, 15, 17, 23, 25, 29. *Vol. 7 - 1447-8A).*

The Offer of Proofs (*Vol. 7 - 1387-1392A*) list of Exhibits (*Vol. 7 - 1393-1396A*) not previously admitted consisting of 227 exhibits were admitted (*Vol. 7 - 1429-1430A*).

Under the above modus operandi agreement, the trial judge, made a "severance." Viz, that proof of damages was to be deferred pending outcome of the Motion for Directed Verdict. *(Vol. 7 - 1339-1341A) (Vol. 7 - 1457A)*

Petitioner is a Michigan corporation. Prior to July of 1968, it operated a dealership in Livonia specializing in NSU automobiles. After that date it entered into an importer contract with NSU June 17, 1968. (*17a-29a*), later adding California (*31a*).

ANAU, a corporation of the German Federated Republic was formulated by the merger of Auto Union Gmbh (Auto Union) and NSU Motorenwerke Aktiengesellschaft, NSU (Ex. 54, 55, 56). VW owned all of the stock of Auto Union, Ex. 55. (Par. 2) and became the owner of 59.5% of the stock of ANAU; it became owner of 99% of ANAU's stock (*Vol. 6 - 1132A*). VWOA is a wholly owned subsidiary of VW (*Vol. 7 - 1302A*) and it is the sole importer of Porsche and Audi cars in the United States (*Vol. 7 - 1304A*). Import, a Michigan corporation distributed Volkswagen, Porsche and Audi cars in midwestern United States. It is a part of the Volkswagen distribution network, but is independently owned and operated. (*Vol. 1 - 203-4A*)

The Importer Contract's (*Ex. 32*) (*17a-29a*) termination date was extended to December 31, 1973. (*Ex. 46*) Petitioner built a dealer network of approximately 65 dealerships in 65 cities and towns. (*2a. 3a par. 8*) Petitioner was granted the sale of "NSU" cars in 10 states under *Ex. 32* NSU (later California was added, *Ex. 37*). Petitioner's claims, posture and analyses of exhibits are detailed in *P-Br-1* pp 33-57 and *P-Br-2 bottom pp. 3-7, bottom pp. 9-12 and pp. 9-25 in substance as follows:* There were 7 NSU cars which were to be exported to the United States (*Ex. 88*) including the revolutionary Wankelpowered Ro-80, a tie-in vehicle. After the merger, these were cut to one car. The supply of cars to Petitioner was cut off, as the stock transfer from ANAU to VW increased from 59.5% to 99%, beginning in the latter part of 1970. Though the Importer Contract was not to terminate until December 31, 1973, for practical purposes, it was terminated in 1970. No cars were delivered by ANAU to Petitioner in 1971 and 1972, (*2a(4)*). This, it is Petitioner's claim, was an attempt to force Petitioner to accept an earlier termination of the Importer Contract, *Ex. 32*. In this all of the defendants were involved, Petitioner claims the evidence as admitted or proffered fully established its claims. The Petitioner had been promised distribution of the Audi car in its contract area and that Petitioner would be included in the *VW* organization for distribution purposes; *Ex.*

42, but instead the Audi car was channeled thru the wholly owned *VWOA* subsidiary of *VW* and by it thru *Import* as exclusive distributor in some of Petitioner's contract area. Petitioner was induced to file application thru *Import* for a dealership franchise as a first step to the solution of the Petitioner's Contract problem. All steps for the granting of that application, except one, were approved, and that step was the immediate termination of the Overseas Inc. Contract, *Ex. 32*, which Petitioner refused to accept. The granting of the dealer franchise application was dangled like a "carrot on a stick" from December 24, 1969 until February 17, 1972 when the package was sent to *VWOA* with approval of *Import* as to all technical details, where the application still pends, unrejected but not accepted *1292-98, 1300, 1301A*. In contrast, after suit was filed, Petitioner obtained a Fiat dealership within six weeks of its application. *Exhibits 684, 686, 687, 689, 690.*

After suit was filed on September 18, 1972, Petitioner received notice of arbitration from ANAU to be held in Zurich, Switzerland (*33a-38a*) and within 10 days thereafter its Motion to Stay and Abate (*32a*) which was denied, (*P 27a-68a*) the matter was appealed to the Sixth Circuit Court of Appeals. Motion to dismiss the appeal by defendants and a motion to suspend the trial court's order, by Petitioner were made. Both Motions were denied by the Sixth Circuit pending hearing on its merits. (*Vol. 1-312A*) Hearing on the merits came on November 6, 1973, when the Appellate Court 6th Circuit entered its Order deferring further consideration, briefing and consolidating this case with the appeal on its merits. (*Vol. 1 p. 107A*) In the meantime, a trial occurred in the lower court, a directed verdict had been entered against Petitioner, and an appeal taken to this Court (*Vol. 1 106-7A*).

An Arbitration Award (*Vol. 2-333A*) was made shortly before trial, Petitioner did not appear because of the danger of waiving its rights in the first appeal herein. The Arbitration Award was offered in mid-trial over objection by Petitioner and without an offer by defendants to amend pleadings as detailed in *PBR 1 - 5-24*.

The relevant part of decision of the trial court relating to standards of sufficiency to withstand a directed verdict, based on

state of Ohio standards though the case was tried in Michigan is at *375 F. Supp, 525*, Vol. 8, p. *1509A* (footnotes 82, thru 88, *1550-1A*) and is in *Appendix I*, 29a, attached.

The relevant part of the decision of the Court of Appeals relating to the standard of sufficiency is in Vol_____ F2d_____1975 (unreported, copy thereof is in *Appendix I 32a-33a*.

A Petition for Re-hearing was timely filed in the Court of Appeals for the Sixth Circuit, copy in *Appendix I*, 15a.

The Order of the Court of Appeals denying Petition for Re-hearing for the Sixth Circuit is in *Appendix I 22a*.

ARGUMENT AND REASONS FOR GRANTING WRIT

1. The decision of the trial court, adopted by the Court of Appeals, granting directed verdict, was based on mis-application of state of Ohio standards of sufficiency of evidence to withstand directed verdict and was in conflict with the federal standards delineated in BRADY, BYRD, CONTINENTAL, ERIE, GALLOWAY, LAVENDER, SIMLER, TENNANT, AND WILKERSON.[1]

The District Court deprived plaintiff of its right under the Seventh Amendment to the Constitution of the United States in a treble damage, antitrust suit, to a trial by jury which had been empanelled. Such denial was based on a directed verdict against plaintiff, based on state of Ohio standards of sufficiency to withstand directed verdicts. (*Appendix II, 29a, 30a, 31a.*)

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[1] A collation of the tests appear verbatim in Appendix II 46a thru 55a, in the cases cited, viz:

Brady v. *Southern Ry. Co.* 320 U.S. 476, 479-480, 1945; *Byrd* v. *Blue Ridge Cooperative* 356 U.S. 525, 537, 538, 539, 1967; *Continental Ore Co.* v. *Union Carbide* 370 U.S. 690, 696, 1961; *Erie Railroad Co.* v. *Tomkins* 304 U.S. 64, 78, 1937; *Galloway* v. *U.S.* 319 U.S. 372, 395, 1942; *Lavender* v. *Kurn* 327 U.S. 645, 653, 1945; *Simler* v. *Conner* 372 U.S. 221, 1962; *Tennant* v. *Peoria & P.U. Ry. Co.* 321 U.S. 29, 33-4, 1943; *Wilkerson* v. *McCarthy* 336 U.S. 53, 57, 1948.

There is a strong federal policy against allowing state rules to disrupt judge-jury relationship in federal courts.[2]

The right to trial by jury in civil cases is a basic and fundamental feature of our system of federal jurisprudence, protected by the Seventh Amendment and should be jealously guarded.[3]

> In *Simler* v. *Conner* 372 U.S. 221, 222, 1962, the Court said: ". .The right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. . . . Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. . ."

The Supreme Court has rested its use of a federal test of sufficiency to withstand directed verdict in actions brought under federal statutes on a policy of giving litigants under such acts similar treatment in all states.[4]

While the Seventh Amendment, in order to preserve distinct roles for judge and jury, implicitly requires some test be used to determine when evidence presented is sufficient to warrant jury consideration, the lack of controlling guidance has left the various federal judicial circuits hopelessly split on usable tests, not only among themselves, but in their own circuits, as hereinafter detailed.[5]

The single important question unresolved by the Supreme Court in this area is whether a single test of sufficiency to withstand directed verdict is to be applied in all federal court cases or whether existing tests of sufficiency are to be continued in any or

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[2] *Byrd* v. *Blue Ridge Cooperative*, supra; *Heron* v. *Southern Pacific* 283 U.S. 91, 94-5, 1930.

[3] *Bailey* v. *Central Vermont R. Co.* 319 U.S. 350, 354, 1942; *Baltimore & C. Line* v. *Redman* 295 U.S. 654, 657, 1934; *Beacon Theatres, Inc.* v. *Westover* 359 U.S. 500, 501, 1958; *Jacobs* v. *U.S.* 315 U.S. 752, 753, 1942.

[4] *Brady* v. *Southern Ry. Co.* 320 U.S. 476, 479, 1943 and cases cited therein.

[5] *Dick* v. *New York Life Ins. Co.* 359 U.S. 437, 444-5, 1958 5 Moore, Federal Practice #50.02 (1), p 2330 (2d ed. 1968); Directions for Directed Verdicts: A compass for Federal Courts, Cooper, 55 Minn. Law Rev. 973-976

all federal court cases, whether in Diversity, FELA, Antitrust or other federal and state common law and statutory actions. The Supreme Court can eliminate the existing confusion by promulgating a uniform test applicable to all cases in federal courts or alternatively by clarifying the roles of tests as delineated in *Brady, Byrd, Continental, Erie, Galloway, Lavender, Simler, Tennant,* and *Wilkerson,* supra.[6]

The Supreme Court expressly granted certiorari in *Mercer* v. *Theriot* 377 U.S. 152, 156 (1964) to resolve the conflict between the circuits on sufficiency tests but the question became moot when it was found that plaintiff's evidence was found sufficient to meet either state or federal test.

The learned District Judge applied state of Ohio tests of sufficiency in this case, which was tried in the Eastern District Court of Michigan (Appendix II *29a, 30a, 31a,* 375 F.Supp. 525, Vol. 8, 1509A, footnotes 1550-1A). In support of the test used the trial judge cited two Ohio cases, as well as the controversial Boeing case.[7]

If state tests of sufficiency are applicable in this case tried in Michigan, shouldn't Michigan's more liberal test of sufficiency be applied?[8] ". .Michigan law does not favor directed verdicts. . ." and in the federal system as said in *Byrd*: ". . .it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed questions of fact to the jury.' "[9]

[6] See Appendix II (46a-55a) for verbatim quotations therefrom.

[7] *Boeing* v. *Shipman* 411 F2d, 365, 372-76 (375 F.Supp. 525, n. 84) (See Appendix II40a, 41a; for verbatim quotes on the two Ohio cases relied on by trial court see Appendix II 31a ~~vin~~: *f/z*; *Domany* v. *Otis Elevator Co.* 369 F2d 604, 608, CA6, 1966; *Teti* v. *Firestone and Rubber Co.* 392 F2d 294, 297, CA6, 1968; *Boeing Co.* v. *Shipman* 411 F2d 365, 372-76, CA5, 1969 (Verbatim quotes of test adopted by majority in Boeing, *Appendix II 40a.*

[8] ". . . . .the court must consider the evidence in the light most favorable to the party against whom the direction is sought and *assume* the same to be true . . . . . and the *legitimate inferences to be drawn from the established facts must be viewed most favorably to plaintiff.*" (emphasis supplied) *Kravat* v. *Indemnity Co.* 152 F2d 336, 338, 1945 (approved in *Hull* v. *Holiday Inn* 478 F2d 223, 225, CA6, 1973; see also *Jenkins & Reynolds Co.* v. *Alpena Portland Cement Co.* 147 F2d 641, 642, 3, 4, CA6, 1906. (Verbatim quotes of tests in the above are at Appendix II *35a, 34a, 34a, 35a* respectively.) See also: *Grand Truck Rw. Co.* v. *Ives* 144 U.S. 408, 417, 1891 (Michigan case).

[9] *Serratoni* v. *Chesapeak & Ohio Ry.* 333 F2d 621, 626, CA6, 1964, cert den 379 U.S. 960, Mich-diversity (verbatim quote in Appendix II, *35a; Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.* 1958, 356 U.S. 525, 537.

The Michigan test of sufficiency, particularly with reference to inferences, is substantially the same as the federal tests applied in *Continental, Gallick, Lavender,* and *Tennant.*[10]

In sum, if state tests are applicable in the Sixth Circuit, then the Michigan standards of sufficiency as herein delineated should have been applied by the trial judge.

CONFLICTS IN SIXTH CIRCUIT ON TESTS OF SUFFICIENCY

There is a good deal of conflict between the panels of Sixth Circuit as to which test of sufficiency is to be applied. Most opinions follow state tests, frequently without mentioning the possibility of some other approach.[11]

Some of the panels in the Sixth Circuit have opted for a federal test.[12] In the light of the Supreme Court's decision in *Fortner*[13] an antitrust treble damage case, the Sixth Circuit after a retrial opted for a federal test, as it did in *Champion*[14] another antitrust treble damage suit.

[10] *Continental Co.* v. *Union Carbide* 370 U.S. 690, 696, 1961; *Gallick* v. *Baltimore & Ohio Ry. Co.* 372 U.S. 108, 114-5, 1962, (quoting *Tennant*); *Lavender* v. *Kurn* 327 U.S. 645, 653, 1945; *Tennant* v. *Peoria & P.U. Ry. Co.* 321 U.S. 29, 35, 1943.

[11] Directions for Directed Verdict: A Compass for federal courts, Cooper, 55 Minn. Law Rev. 903, 974, n 212; and the following cases: *McDonald and Bratcher* 265 F2d 261, 263, 1959, CA6 (be accepted as true); *Lovas* v. *General Motors* 212 F2d 805, 807, 1964, CA6 ("*assumes the truth of the evidence*"); *O'Donnel* v. *Geneva Wheel Co.* 190 F2d 59, 60, 1950 (*follows state rule under "Erie"*) (But see *Lones* v. *Detroit, Toledo and Ironton RR* 398 F2d 914, 919, 1968 and *Trivett* v. *New York Life Ins. Co.* 283 F2d 441, 443-4, which hints at re-examination of *Lovas* and *O'Donnel*, where in *Trivett* supra, dissent, Judge Pope opts for constitutional standard as in *Pogue* v. *Great Atlantic & Tea Co.* 242 F2d 575, 582, written by Judge Rives, who wrote dissent in *Boeing*, supra 411 F2d 265, 379 et seq.) (See Appendix II 41a, 42a). In *Gilreath* v. *Southern Ry. Co.* 323 F2d 158, 162, footnote 4, court declined to re-examine *O'Donnel, Lovas* and *Trivett* supra. In *Price* v. *Firestone* 321 F2d 725, 726-7, 1963, *Lovas,* supra was still being cited with approval.

[12] *Taylor* v. *Cirino* 321 F2d 279, 281 CA6, 1963, diversity Kentucky.

[13] *Fortner Enterprises* v. *U.S. Steel* 394 U.S. 495, 500, 1969.

[14] *Champion Oil Service Co.* v. *Sinclair Refining Co.* 502 F2d 506, CA6 709-713.

CONFLICTS IN OTHER CIRCUITS ON TESTS OF SUFFICIENCY

There is as much confusion in the other federal circuits and within each of the circuits as there is in the Sixth Circuit. They too are snagged in the procedural underbrush.[15]

The controversy peaked in *Boeing*[16] which adopted its own test of sufficiency, ~~was~~ over a vigorous protest by Rives, J. who opted for a constitutional test. *Boeing* overruled *Planters*[17] a diversity case, which had applied the FELA test of *Lavender*, despite the fact that the Supreme Court had refused to interfere by denial of Writ of Certiorari (389 U.S. 930) with the decision of the Chief Judge of the Fifth Circuit. Since *Boeing* was not taken up by certiorari the test of sufficiency adopted by the majority remains a decision of the Fifth Circuit and only adds to the confusion. Judge Rives suggested three constitutional federal tests as his contribution to a solution of the problem;[18] and he still adheres to the views expressed in his dissent.[19]

SUFFICIENCY TEST PROBLEM UNRESOLVED BY PRESENT SUPREME COURT DECISIONS

Simler[20] teaches that the right to jury trial is to be determined as a matter of federal law in *all* actions in federal courts but

[15] *Directions on Directed Verdict*, A Compass for Federal Courts, Cooper, 55 *Minnesota Law Review*, 903, 974, footnote 212, 1971; *Utah Law Review*: *Multiple Sufficiency Tests in Federal Courts: The Scope of Lavender*, 1970, page 156, footnote 10; *5 J. Moore*, Federal Practice 50.06 2d ed. 1969; *Barron & A. Holtzoff*, Federal Practice & Procedure, 1072, at 367, n 5, 2BW Barron & Holtzoff, n 69, 1075, p. 403, n 53.20; Other treatises and authorities discussing standards in the Federal Judicial Circuits are: *5 Moore*, Fed. Pr. 50.02 (1) pp. 2320-1; *Wright and Miller Fed.* Pr. 2524, pp. 540-547; 2528, pp. 563-571, 2529, pp. 572-574; *Texas Law Review* Vol. 42, 1053, 1054-1062; *Michigan Law Review* Vol. 48, pp. 570 (573-4) 576-581; *Michigan Law Review* Vol. 47, pp. 974-978; *Harvard Law Review* Vol. 66, 1523-1525, 1953.

[16] *Boeing* v. *Shipman* 411 F2d 367 (374-5) CA5, 1969, dissent (377-394) (verbatim quotes in Appendix II *40a, 41a*.

[17] *Planters Mfg. Co.* v. *Protection Mutual Ins. Co.* 380 F2d 862, 862, 874, CA5, 1968, cert den 389 U.S. 930 (verbatim quotes in Appendix II *44a, 45a, 46a*.

[18] *Boeing*, supra 411 F2d at 394; (verbatim quotes in Appendix II *41a*.

[19] *Robertson* v. *Douglas SS Co.* 510 F2d 829, 837 (verbatim quote in Appendix II *43a, 44a*.

[20] *Simler* v. *Conner* 372 U.S. 221, 222, 1962

whether to adopt a universal test of sufficiency or a unitary one based on specific types of actions in such cases has not been reached by the Supreme Court.

The Supreme Court has said that the Seventh Amendment prohibits interference by directed verdict where the evidence raises a jury question;[21] has indicated that Congress intended Seventh Amendment tests to govern the relationship between judge and jury in FELA cases;[22] has cited FELA opinions as if they established the general test of directed verdicts;[23] has stated that in FELA cases jury trial was part of the remedy;[24] and in a series of per curiam opinions the Supreme Court has reversed judgments of lower courts that had substituted their views for that of the jury in non-FELA or Jones Act cases.[25]

The question whether the Seventh Amendment bars the Courts or Congress from establishing different measures of judicial control for different types of cases or whether the preservation of right to jury trial requires no more than adequate judicial control to preserve its common law character,[26] remains unresolved.

If the Seventh Amendment is to control tests of sufficiency and require uniformity in the exercise of jury trials in federal courts, this would seem to require uniformity in the granting or denying of directed verdicts, since there is no room for balancing.

[21] *International Terminal Operating Co.* v. *N. V. Nederl. Amerik Stoomv. Maats.*, 393 U.S. 74, 1968.

[22] *Rogers* v. *Missouri Pac. RR* 352 U.S. 500, 508 n 18, 1957.

[23] *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 370 U.S. (private antitrust, referring to FELA cases among others, in stating appropriate tests for directed verdicts), *Dick* v. *New York Life Ins. Co.* 359 U.S. 437, 445 n 8, 1959 (referring to FELA cases as references for directed verdict standards, while not saying whether federal standards should be applied in diversity cases.

[24] *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 359060, 1962.

[25] *Willaims* v. *Carolina Life Ins. Co.* 1954, 348 U.S. 802, reversing CA5, 1954, 210 F2d 477; *Swafford* v. *Atlantic Coast Line R. Co.* 1955, 350 U.S. 807, reversing CA5, 220 F2d 901; *Union Trust Co.* v. *Eastern Air Lines, Inc.* 1955, 350 U.S. 907, reversing CA5 232 F2d 62; *Gibson* v. *Phillips Petroleum Co.* 352 U.S. 874, reversing CA5 (discussed in 35 Texas Law Rev. 768).

[26] *Heron* v. *Southern Pacific Co.* 283 U.S. 91, 1951.

THE EFFECT OF THE APPLICATION OF THE TESTS OF SUFFICIENCY BY THE LOWER COURTS

The effect of the application of the tests of sufficiency applied by the lower courts was to deprive the Petitioner of a trial by jury to which it was entitled ". . . under the influence—if not the command—of the Seventh Amendment (which) assigns the decisions of disputed questions of fact to the jury."[27] If this effect was limited to the Petitioner it might have little significance, but when many other federal courts throughout the country are denying other litigants jury trials, despite the unqualified mandate of the Seventh Amendment, then there is a basic conflict ". . .between the people's aspiration for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges."[28]

There is an increasing insistence in the federal courts on the advantage of obtaining an actual verdict rather than a directed verdict;[29] and any doubt should be resolved in favor of permitting a jury trial.[30]

The fundamental principle is that there must be a minimum of interference with the jury.[31]

A vital factor in federal tests is the emphasis the Supreme Court places on the part "inferences" play in sufficiency tests. The Supreme Court has said it is the jury's function to select from conflicting inferences and conclusion that which is most reasonable;[32] has said one subjected to motion for directed verdict must be given the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be drawn;[33] has

[27] *Byrd* v. *Blue Ridge Cooperative* 356 U.S. 525, 537, 1957.

[28] *Galloway* v. *United States* 319 U.S. 372, 408, & footnote 20.

[29] *Directions for Directed Verdicts: A Compass for Federal Courts, Cooper, 55 Minn. Law Rev. 903, note 1; Campbell* v. *Oliva* 424 F2d 1244, 1251-2, CA6, 1970.

[30] *Local 783 Allied Ind. Wkrs. of Am.* v. *General Electric Co.* 471 F2d 751, 756, CA6, 1973 (Michigan).

[31] Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. Law Rev. 903, 921.

[32] *Rogers* v. *Missouri Pacific R. Co.* 352 U.S. 500, 504, n 8, 1956.

[33] *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 370 U.S. 690, 696, 1962.

held that it is not the function of the court to search the record for conflicting circumstantial evidence in order to take the case from the jury;[34] has said that in passing on whether there is sufficient evidence to submit an issue to the jury the court need look only to the evidence and reasonable inferences which tend to support the case of one against whom a peremptory instruction has been given;[35] has held that it is necessary to look only to the evidence favorable to the party opposing the motion;[36] and has held on motion for directed verdict, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that are fairly deductible therefrom;[37] has held that whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference;[38] has held in an antitrust case that though there was no direct evidence of a refusal to sell, the evidence tended to indicate a purpose to monopolize as a matter of just and reasonable inference to warrant submission to the jury.[39]

Petitioner recognizes the "two-court rule" that the Supreme Court does not review findings of fact by two courts below in the absence of obvious and exceptional showing of error. An exception has been made where as here, there is a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass on the federal question to analyze the facts and to make its own independent examination of the record when federal constitutional deprivations are alleged[40] and to decide for itself facts or constructions upon which federal constitutional issues[41]

[34] *Tennant* v. *Peoria & P.U. Ry. Co.* 321 U.S. 29, 35.

[35] *Wilkerson* v. *McCarthy* 336 U.S. 53, 57, 1949.

[36] *Berry* v. *United States* 312 U.S. 450, 452-3.

[37] *Gunning* v. *Cooley* 281 U.S. 90, 94, 1929.

[38] *Lavender* v. *Kurn* 327 U.S. 645, 653, 1945.

[39] *Eastman Co.* v. *Southern Photo Co.* 359 U.S. 359, 375, 1926.

[40] *Napue* v. *Illinois* 306 U.S. 264, 271, 1958.

[41] *Kern-Limerick Inc.* v. *Scurlock* 347 U.S. 110, 121, 1953.

We start with the premise that the trial court misapprehended the significant differences between the tests of sufficiency under federal tests and those of the state of Ohio and did not evaluate their marked disparity. In using the improper tests as a basis for directed verdict, the trial court deprived the Petitioner of the jury trial guaranteed to him under the Seventh Amendment of the Constitution of the United States.

The trial court, for the purpose of the motion for directed verdict, accepted all the testimony and exhibits as admitted (F.Supp. 375 p. 525-Vol. 8, 1508, Vol. 7-1329-134A, Vol. 7-1385-6A, 1447-8A) except for 11 binding facts which the trial court held, (Petitioner claims improperly, see P-Br-1, pp. 26-31) could not be controverted; and it ruled that no inferences could be drawn which were inconsistent with them. (375 F.Supp. 524-5, Vol. 7 1447-8A) The Sixth Circuit adopted the decision of the trial court in toto. (Appendix I, 10a)

The failure of the trial court to apply proper standards to the facts was raised in P-Br 1-31.

The opinion of the Trial Court written seven months (375 F.Supp. 499) after the oral directed verdict of August 7, 1973 (Vol. 7, 1397A-1457A) contained many inaccuracies which were not supported by the record as more particularly set forth in Petition for Re-Hearing in Sixth Circuit (Appendix 15a-21a) and Br 2, p. 17-18)

The basis for the factual findings of the trial judge is set out in the footnotes 89 thru 101, 375 F.Supp. 526-531, which indicate he was searching the record for testimony unfavorable, rather than favorable to Petitioner.[42]

Petitioner's response to these footnotes appear in P-Br-1, 33 thru 57; P-Br-2, 17 et seq. and Appendix I, 15a- 1521.

While the Sixth Circuit ruled that certain binding facts found by the trial judge would not have affected the decision, (Appendix I, 10a) it had an effect since the trial judge ruled that no inferences

[42] Last par. n. 89. 375 F.Supp. 527, and court's admission in preceding sentence: "Plaintiff's assertions do appear to be within permissible bounds of inference based on the exhibits cited."

could be drawn which were inconsistent with them. (375 F.Supp. 524-5) The impact of inferences has much to do with the outcome of this case. Appellate Court did not reach this issue.

The Trial Court and the Appellate Court in adopting the lower court's findings, contrary to the teaching of *Tennant*, searched the record for conflicting evidence to take the case from the jury. By way of limited illustration in note 99, 375 F.Supp. 529, the lower court referred to a letter from ANAU July 15, 1970 speaking of a steadily decreasing demand for NSU automobiles throughout the world, but did not consider other exhibits which demonstrated the falsity of this claim. (Exhibit 883, which speaks of extremely large production of ANAU cars for 1970, "covering a sizeable slice of the auto market in Germany and importing nations." (*See Br 2-17-18 for details*); and in note 100, 375 F.Supp. 529, a quotation is taken out of context and does not quote that part of the exhibit favorable to Petitioner. (See P-Br-1, 33 thru 57; Br-2-17 et seq) 15a-21a, for Petitioner's Response to these objections.)

By way of further limited illustration the court stated no certificate of conformity, with reference to the tie-in product, RO-80, had ever been produced. It was produced, Exhibit 279, was offered and read into the record (Vol. 336-7A, P-Br-1-54-5, P-Br-1-3 for detail).

The foregoing references demonstrate that the lower courts were not following the teaching of *Rogers*, supra, that it was the function of the jury to select from conflicting inferences and *Continental*, supra, that Petitioner should have been given the benefit of all inferences which the evidence fairly supports even though contrary inferences might be drawn, nor the teaching of *Tennant*, supra, that the court's function is not to search the record for conflicting circumstantial evidence in order to take the case from the jury, nor the teaching of *Wilkerson*, supra, that the court need only look to the evidence and reasonable inferences which tended to support case of Petitioner, nor the teaching of *Berry*, supra, that it was necessary to look only to the evidence favorable to Petitioner, nor the teaching of *Lavender*, supra, that where fair-minded men may draw different inferences, a measure of speculation and conjecture is required by those whose duty it is to settle the dispute by choosing what seems to them to be the

most reasonable inference and only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.

The Sixth Circuit, in adopting the decision of the District Court, by implication approved the standards used in the trial court. If the District Court erred in its choice of standards of sufficiency to withhold direct verdict, then the Sixth Circuit erred equally, for both courts are bound by the same standards of sufficiency.[43]

CONCLUSION

Since the question of applicability of standards of sufficiency to withstand directed verdict involves the question of deprivation of jury trial under the Seventh Amendment and a determination of whether proper standards were used, is necessary for a disposition of this case, a writ of certiorari should issue to review the opinions and judgments of the Circuit Court of Appeals for the Sixth Circuit and of the District Court for the Eastern District of Michigan, Southern Division.

Respectfully submitted,

Wilfrid L. Burke
505 Palms Building
Detroit, Michigan 48201
Counsel for Petitioner

Dated: September 24, 1974

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[43] *Continental Co.* v. *Union Carbide* 370 U.S. 690, 1961, n 6.

75-494

Supreme Court, U. S.
FILED
SEP 30 1975
MICHAEL RODAK, JR. CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

APPENDIX I
APPENDIX II

OVERSEAS MOTORS, INC., a Michigan corporation,

Petitioner-
Plaintiff,

-vs-

IMPORT MOTORS LIMITED, INC., a Michigan corporation; AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (former NSU MOTORENWERKE AKTIENGESELLSCHAFT), a foreign corporation; VOLKSWAGENWERK AKTIENGESELLSCHAFT, a/k/a VOLKSWAGENWERK GmbH, a corporation of the German Federated Republic; and VOLKSWAGEN OF AMERICA, INC. (Porsche-Audi Division), a New Jersey corporation, jointly and severally,

Respondents-
Defendants.

Civil Action No. 75-494

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4.	Appellant's Petition for Rehearing, June 14, 1975	15a
5.	Order Denying Petition for Rehearing, July 10, 1975 .	22a

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OVERSEAS MOTORS, INC., a Michigan corporation,

Plaintiff,

-vs-

IMPORT MOTORS LIMITED, INC., a Michigan corporation; AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (former NSU MOTORENWERKE AKTIENGESELLSCHAFT), a foreign corporation; VOLKSWAGENWERK AKTIENGESELLSCHAFT, a/k/a VOLKSWAGENWERK GmbH, a corporation of the German Federated Republic; and VOLKSWAGEN OF AMERICA, INC. (Porsche-Audi Division), a New Jersey corporation, jointly and severally,

Defendants.

Civil Action No. 38155

JUDGMENT ON DIRECTED VERDICT

The above-entitled action having come on for trial before the Court; Plaintiff having presented all of its proofs on the issue of liability and having concluded its case; the Defendants' joint Motion for Directed Verdict having been made; argument having been heard and briefs in support of the respective positions of Defendants and Plaintiff having been considered; and the Court having been fully advised in the premises,

IT IS ORDERED and ADJUDGED that the Defendants' Motion for Directed Verdict as to all counts of Plaintiff's Complaint be and the same is hereby granted as to each and every defendant on each and every count and/or cause of action, and

that the Plaintiff take nothing; that the action be dismissed on the merits and with prejudice, and that the Defendants recover of the Plaintiff their taxable costs.

JOHN FEIKENS
District Judge

Dated: August 13, 1973
Detroit, Michigan

A TRUE COPY
HENRY R. HANSSEN, *Clerk*
BY A. T. DAVID
DEPUTY CLERK

APPROVED AS TO FORM:

Burke & Wilson
Attorneys for Plaintiff

By WILFRED L. BURKE
Wilfred L. Burke

FILED APRIL 2, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OVERSEAS MOTORS, INC., a Michigan Corporation,

Plaintiff,

-vs-

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT), a foreign corporation, VOLKSWAGENWERK AKTIENGESELLSCHAFT aka VOLKSWAGENWERK GmbH, a corporation of the German Federated Republic, and VOLKSWAGEN OF AMERICA, INC. (Porsche-Audi Division), a New Jersey corporation, jointly and severally,

Defendants.

Civil Action No: 38155

ORDER

At a session of said Court held in the Federal Building, in the City of Detroit, County of Wayne, State of Michigan, on APRIL 2, 1974.

PRESENT: HON. JOHN FEIKENS
District Court Judge

This Court having previously granted Defendants' Motion for a Directed Verdict and an Order having been entered, but the Court having reserved the right to issue a written opinion, the Plaintiff's Motion for a New Trial having been considered, and

the Court having issued its "Memorandum Opinion Granting Motion for a Directed Verdict and Denying Motion for Reconsideration and for a New Trial" on March 18, 1974.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for a New Trial be and hereby is denied.

JOHN FEIKENS (s)
District Court Judge

Approved as to form only:

ByWILFRID L. BURKE (s)
Wilfred L. Burke
Attorney for Plaintiff

Miller, Canfield, Paddock and Stone

By Gregory L. Curtner (s)
Gregory L. Curtner
Attorneys for
Volkswagenwerk Aktiengesellschaft
and Volkswagen of America, Inc.

Travis, Warren, Hammond, Ziegelman & Burgoyne

By BERT BURGOYNE per GLC (s)
Bert Burgoyne
Attorneys for
Audi NSU Auto Union
Aktiengesellschaft

Miller, Johnson, Snell & Cummiskey

By GORDON J. QUIST per GLC (s)
Gordon J. Quist
Attorneys for
Import Motors Limited, Inc.

Nos. 72-2198 and 74-1651

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OVERSEAS MOTORS, INC., a Michigan corporation,

Plaintiff-Appellant,

-vs-

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU Motorenwerke Aktiengesellschaft), a foreign corporation, Volkswagenwerk Aktiengesellschaft a/k/a Volkswagenwerk Gmbh, a corporation of the German Federated Republic, and Volkswagen of America, Inc. (Porsche-Audi Division), a New Jersey corporation, Jointly and Severally,

(72-2198) *Defendants-Appellees,*

ON APPEAL from the United States District Court for the Eastern District of Michigan.

OVERSEAS MOTORS, INC., a Michigan corporation,

Plaintiff-Appellant,

-vs-

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU Motorenwerke Aktiengesellschaft), a foreign corporation, Volkswagenwerk Aktiengesellschaft, of the German Federated Republic and Volkswagen of America, Inc., (Porsche-Audi Division), a New Jersey corporation, Jointly and Severally,

(74-1651) *Defendants-Appellees.*

Decided and Filed June 2, 1975.

BEFORE: LIVELY and ENGEL, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

ENGEL, Circuit Judge. This is an action by Overseas Motors, Inc. (Overseas) against Audi NSU Auto Union Aktiengesellschaft (ANAU), Volkswagenwerk Aktiengesellschaft (Volkswagen), Volkswagen of America (VOA), and Import Motors Limited, Inc. (Import), alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (Count I), Section 7 of the Clayton Act, 15 U.S.C. §18 (Count II), and the Automobile Dealers Day in Court Act, 15 U.S.C. §1221 et seq (Count III). The district judge, after five weeks of trial, granted defendants' motion for a directed verdict on all counts. We affirm.

Overseas is a Michigan corporation which was the distributor of NSU automobiles in an eleven state area. ANAU, a German corporation, is the successor to NSU Motorenwerke Aktiengesellschaft which manufactured NSU automobiles, and Auto Union Gmbh, manufacturer of Audi automobiles. The corporations merged in 1969.

Volkswagen, a German corporation, is the manufacturer of Volkswagen and Porsche automobiles. It also controls 99% of the outstanding stock of ANAU. VOA is a wholly owned subsidiary of Volkswagen whose sole function is the importation and distribution of Volkswagen, Porsche and Audi cars in the United States. Import distributes Volkswagen, Porsche and Audi cars in several midwestern states, but unlike VOA, is independently owned and operated.

In 1968 Overseas entered into an importer contract with the predecessor of ANAU for exclusive rights to sell NSU cars in ten (later eleven) states. The significant provisions of the importer contract included an arbitration agreement calling for all disputes arising under the contract to be decided by an arbitration court in Zurich, Switzerland, a provision making the contract terminable by either party at the end of any calendar year upon giving three months' advance notice, and an exclusivity provision requiring that Overseas deal only in NSU products.

Overseas obtained numerous dealers throughout the franchise area in anticipation of the car sales to be generated by the enterprise. It also carried out training programs, advertised extensively, and cooperated with ANAU in helping it qualify NSU autos under American safety and emissions standards. In late 1970, deliveries of NSU autos to Overseas which had previously been insufficient to meet Overseas' orders, ceased entirely.

On July 15, 1970, approximately a year after the merger of NSU and Audi, ANAU notified Overseas by letter that it wished to take up negotiations with its American importers concerning termination of the importer contracts. Its expressed intent was to find a "...viable and fair solution in all cases." ANAU proposed that the importers be compensated either through inclusion in the Volkswagen distribution network, or by payment of a remuneration for the giving up of import rights.

In April 1971 ANAU sent a second letter to Overseas informing the company that while it was voluntarily extending Overseas' importer contract until December 31, 1973, the franchise would be terminated on that date. Pointing out that the American market for NSU automobiles had not developed "...anywhere nearly as well as both you and we had hoped when we made our agreement of July 1, 1978..." ANAU claimed that American safety and exhaust standards had made it increasingly difficult to supply NSU cars at reasonable cost, in consequence of which it had cut its American line back to one model only, the NSU 1200C. In the letter ANAU, which had previously released Overseas from the exclusivity provisions of the franchise agreement, also consented to Overseas' termination of the contract at any time upon giving three months' notice.

ANAU and Overseas entered into negotiations concerning termination of the importer contract in which the possibility of Overseas obtaining a Porsche-Audi dealer's franchise was discussed. Overseas applied through Import to VOA for such a franchise, but final approval of the application was refused. The settlement negotiations failed to produce any other agreement between the parties.

Overseas commenced this suit in April, 1972 and shortly thereafter ANAU gave notice that it intended to submit the termi-

nation grievance to arbitration as provided by the importer contract. A motion to stay reference of the grievance to arbitration was denied by Judge Feikens, and on November 24, 1972 ANAU submitted the matter to the Swiss arbitration court. Overseas' separate appeal from the denial of its motion for stay has been consolidated with its appeal from the judgment on the merits.

The principal issue is whether the evidence, with permissible inferences to be drawn therefrom, was sufficient to require submission of any of Overseas' claims to the jury on any of the theories of recovery embodied in the complaint. Sub-issues are whether the district judge erred in his determination of the extent to which certain findings of the Swiss court were binding upon the plaintiff in the district court action under the doctrine of collateral estoppel, and whether the judge erred in excluding evidence of the negotiations conducted for settlement of the dispute.

The comprehensive opinion of District Judge John Feikens is set forth at 375 F. Supp. 499 (E.D. Mich. 1974).

Appellate review of the action of a district court in granting a motion for directed verdict demands the most painstaking review of the evidence to make certain that what is claimed not to be there, in fact, isn't.

> "To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict ...An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify." *Forner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F.2d 1095 (6th Cir. 1971)."

Overseas' principal antitrust claim was that the defendants conspired to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. §1[1] by "pinching off" its supply of cars, thus

[1] 15 U.S.C. §1 provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:

forcing Overseas out of business as an importer and distributor of NSU automobiles. The district court held that Overseas had failed to prove either element of the Sherman Act offense, namely (1) a contract, combination or conspiracy which resulted in (2) an unreasonable restraint of trade.

Overseas attempted to establish the conspiracy by use of circumstantial evidence which it claimed created a permissible inference of collusion among the defendants. The district judge analyzed this evidence in terms of three categories of acceptable ways to prove conspiracy by circumstantial evidence: motive, opportunity and consistency of overt acts. He determined that the evidence was insufficient to establish an inference of conspiracy and survive the motion for directed verdict. Similarly, Judge Feikens analyzed Overseas' claim of restraint of trade in terms of conduct which would be *per se* illegal under the Act and conduct which would be unreasonable under the "rule of reason", *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911). The court found that the proofs offered totally failed to establish the requisite restraint of trade under either of these theories. Count I also alleged a violation of §2 of the Sherman Act, 15 U.S.C. §2.[2] Judge Feikens ruled that the claims of monopoly and of attempt to monopolize failed for lack of proof of relevant market and proof of specific intent to monopolize.[3]

Overseas alleged in Count II that "the merger of Audi and VW in July, 1970, ...resulted in substantially lessening competition and tended to create a monopoly" in violation of Section 7 of the Clayton Act, 15 U.S.C. §18.[4] The trial judge held that this

[2] 15 U.S.C. §2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[3] Overseas does not appear to have seriously pressed its claim of a Section 2 violation at trial. The case was tried essentially on a conspiracy theory, and Judge Feikens limited his discussion of Overseas' Section 2 claims to a footnote in his opinion. Overseas' complaint, for example, does not even state which of the defendants it claims was a monopolist or attempted to monopolize.

[4] In actuality, the merger was between NSU and Porsche-Audi. Volkswagen ultimately acquired 99% of the outstanding stock of the new corporation, ANAU.

claim failed altogether for want of any proof as to relevant market. Overseas has not contested this finding on appeal.

A careful review of the record demonstrates that Overseas' antitrust issues were never clearly articulated and we have little to add to the extensive discussion of the evidence made by the district judge in his memorandum opinion. Our examination of the evidence compels us to conclude, as did Judge Feikens, that plaintiff has totally failed in its proofs on the key elements of its antitrust claims:

> The overwhelming reality which emerges from the many weeks of testimony and the hundreds of exhibits in this case is the total failure of the plaintiff to even address many of the central questions raised by the law it has invoked, and its complete lack of concrete evidence as to those elements with which it has concerned itself. 375 F. Supp. at 544

Plaintiff claims it was precluded from effectively presenting evidence in support of his antitrust claims becuase of the application of the doctrine of collateral estoppel by the district judge to make binding certain findings of the Swiss arbitration court. In addition, it claims the district judge improperly excluded certain evidence of the settlement negotiations between Overseas and ANAU which purportedly linked VOA and Import to the conspiracy to drive Overseas out of business.

The narrow application of collateral estoppel principles to the findings of the Swiss court could not in any event be said to have affected the outcome since the facts so found were largely undisputed and were apparent on the face of the record. For purposes of ruling upon the motion for directed verdict, the district judge considered the proffered settlement evidence even though he was convinced it was inadmissible. We have also considered this evidence and conclude that its admission would not change the result here.

Overseas' third claim, embodied in Count III of the complaint, is that ANAU violated the Automobile Dealers Day in Court Act, 15 U.S.C. §1221 et seq. by attempting to coerce Overseas into terminating its franchise agreement earlier than the December 31, 1973 date which it had voluntarily set in its letter of April 15, 1971.

15 U.S.C. §1222[5] allows an automobile dealer a cause of action against a manufacturer where the manufacturer has failed to act in "good faith" in performing any of the terms or provisions of the franchise, or in terminating or not renewing the franchise with such dealer. "Good faith" is given a quite restrictive definition in 15 U.S.C. §1221(e),[6] however. In order to fail to act in good faith, a manufacturer must act in such a way as to coerce, intimidate, or threaten to coerce the dealer. Several types of coercion are alleged. First, Overseas claims that ANAU attempted to coerce termination by increasing prices on the vehicles to such an extent that they were commercially noncompetitive. While there was evidence to support the claim that prices were increased, there was no evidence to support the claim that the prices were increased for any other reason than that given by ANAU: increasing difficulty in producing NSU in small volume while at the same time complying with American safety and exhaust requirements. There was no evidence at all to support any claim of price discrimination among American distributors.

Overseas' theory that ANAU "pinched off" deliveries of NSU autos to induce an early termination of the franchise must be understood in the framework of the contractual relations of the parties. Section 12(1) of the importer contract provides in part:

> "This contract comes into force on the first day of July, 1968. Either party to this contract may terminate this contract with three months' notice as of the end of any calendar year, initially as of December 31, 1969."

[5] 15 U.S.C. §1222 provides:

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

[6] 15 U.S.C. §1221(e) provides:

> (e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

Thus, when ANAU wrote its April 15, 1971 letter to Overseas it was fully empowered to terminate the agreement effective December 31, 1971 under §12(1) of the agreement. No coercion was needed to achieve this end if termination was desired. Instead a two-year extension of the contract was granted and the requirements of §12(1) were waived to permit Overseas to terminate at any time simply upon giving three months' notice. The April 15, 1971 letter then looked to the termination of the relationship of the parties and the two year extension of the agreement appears primarily to have been an accommodation to Overseas to permit it adequate time to acquire a new distributorship.

In applying the definition of "good faith" contained in 15 U.S.C. §1221(e), it is necessary to consider not only whether the manufacturer brought pressure on the dealer, but also his reason for doing so. *Rea* v. *Ford Motor Co.*, 497 F.2d 577 (3rd Cir. 1974). Here there was no evidence to suggest any reason why ANAU would have wanted or needed to use coercion to force Overseas to terminate the importer contract. As stated by the district judge:

> ANAU was not obligated to deliver cars to plaintiff even while the contract was in force, and in any event the contract was terminable at will on relatively short notice. No elaborate conspiracy such as plaintiff alleges was necessary to secure termination of the contract or effect a withdrawal of NSU products from the American market.
>
> ...The defendants were free to make whatever arrangements they wished for its importation and distribution in this country, and whatever rights plaintiff may have had in the NSU product line were irrelevant. The only conceivable motive for forcing plaintiff to abandon its exclusive distributorship would have been a desire to transfer the right to import and distribute NSU cars within its territory of someone else (presumably VWOA and Import). However, in view of the undisputed fact that the NSU product line has been withdrawn from the American market, the right to

distribute it has become totally meaningless.[7] 375 F. Supp. at 533

Overseas also introduced extensive evidence concerning the Ro-80 automobile which was to be produced as part of the NSU line. The Ro-80, powered by a Wankel motor, was described by ANAU as a revolutionary automobile with tremendous sales potential in the United States market. There was evidence that Overseas had been led to believe that it would be involved in the distribution of the Ro-80 in this country and it is undisputed that the automobile has never been marketed in the United States. Overseas claims that the Ro-80 was withheld in bad faith from the American market, although the district court found no evidentiary basis for such a conclusion.

Even assuming that Overseas is correct and that there was evidence to support a jury finding that ANAU had withheld the Ro-80 from the United States market in "bad faith" as that term is normally understood, Overseas would still not be entitled to recover under the Act because of the specialized definition which the Act accords to "good faith".

Overseas' contentions that the termination violated the Act has at least some support in the legislative history of the Act. It is true that Congress was concerned with the arbitrary terminations of dealer franchises which had occurred under old franchise contracts:

> This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, canceling, or not renewing his franchise.
>
> H.R. Rep. No. 2580, 85th Cong. 2d sess. (1956), 3 U.S. Code Cong. and Admin. News, 1956, p. 4600.

A similar concern can be found in the expressed disapproval of earlier cases which refused to read into dealer franchises a

[7] Judge Feikens was commenting upon the lack of any motive for the alleged conspiracy between ANAU and the other defendants. However, we think this evidence also shows lack of motive for the type of coercion which Overseas claims was used.

requirement of good faith as a condition to termination of the agreement by the automobile manufacturer. See 3 U.S. Code Cong. and Admin. News (1956), *supra*, at 4599, citing particularly *Bushwick-Decatur Motors, Inc.* v. *Ford Motor Co.*, 116 F. 2d 675 (2nd Cir. 1940) and *Buggs* v. *Ford Motor Co.*, 113 F. 2d 618 (7th Cir. 1940).

The broader intention expressed in the House Report is at odds, however, with the express language finally incorporated in the Act, and the rather specialized definition of good faith in the statute must control, notwithstanding the conflicting language in the House Report. The cases have uniformly held that evidence of coercion or intimidation is necessary to a showing of lack of good faith under the statute, and a mere showing of arbitrary or other bad faith conduct absent coercion is not a sufficient ground for recovery under the Act. *Berry Bros. Buick, Inc.* v. *General Motors Corp.*, 257 F. Supp. 542 (E.D. Penn. 1966), *aff'd.* 377 F. 2d 552 (3rd Cir. 1967); *R.A.C. Motors, Inc.* v. *World-Wide Volkswagen Corp., 314 F. Supp. 681 (D. N.J. 1970); Unionvale Sales Limited* v. *World-Wide, Volkswagen Corp.*, 299 F. Supp. 1365 (S.D. N.Y. 1969). This circuit has ruled that under Section 1222 the absence of good faith as defined in Section 1221(e) is literally construed. Evidence of coercive conduct is an essential element of any cause of action under the Act. *Frank Chevrolet Co.* v. *General Motors Corp.*, 304 F. Supp. 307 (N.D. Ohio 1968), *aff'd.* 419 F. 2d 1054 (6th Cir. 1969).

We are not here concerned about ANAU's liability for breach of contract. That cause of action was not pleaded here, nor could it in view of the arbitration provision. Our concern, therefore, is solely with any statutory liability imposed by 15 U.S.C. §1221 *et seq.*

Here Overseas has failed to introduce any evidence of coercion or intimidation in connection with ANAU's conduct concerning the Ro-80. While Overseas' evidence may have created an inference of bad faith not involving coercion, this was insufficient to send the statutory claim to the jury.

The order of the district court in 72-2198 and the judgment of the district court in 74-1651 are affirmed.

Costs to appellees.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OVERSEAS MOTORS, INC., a Michigan corporation; ***Plaintiff (Appellant)*** **-vs-** **IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK AK -TIENGESELLSCHAFT aka VOLKSWAGENWERK GMBH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, INC. (PORSCHE-AUDI DIVISION) a New Jersey Corporation, jointly and severally,** ***Defendants (Appellees)***	**No. 74-1651** **and** **No. 72-2198** **(Consolidated)**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

APPELLANT'S PETITION FOR REHEARING IN BANC

ERRATA: Page 1 of Original Brief. note 2, figure (1665) is reference to Transcript, should be Vol. 7, p-1385 Appendix.

Page 21, Reply Brief, 2nd par 2 (figure 1164 incorrect, should be Vol 6, page 1161 Page 16 Reply Brief, bottom of page, figure 1665A is Transcript page, should be Vol 7. page 1385 Appendix)

INTRODUCTION

Now comes Overseas Motors, Inc., a Michigan corporation, Plaintiff-Appellant, and respectfully petitions for rehearing in banc of the Court's decision of June 2, 1975, which affirmed the District Court's ruling of directed verdict for appellees.

1. We respectfully submit that the record does not support the following findings of the Court:

On Page 6 of the Decision the Court has alleged that it is our allegation in Count II that the merger of Audi and VW in July, 1970 resulted in substantially lessening competition and tended to create a monopoly, in violation of *15 USC #18*, was not contested on this appeal. This question was answered by Plaintiff-Appellant on page 5 of its Reply Brief.

2. The Court found (page 4 of Decision) that the application for franchise from VWOA thru Import was refused. The testimony was that the application was being held in abeyance and that it had not been rejected, and was not a dead issue. *Vol. 7, p. 1300-1*. The testimony further was that the submission of plaintiff-appellant's application by Import was Import's endorsement of the franchise application (*Vol 6. p. 1294*) The failure of appellees to reject the application and their behavior in still holding the application in abeyance is but one of several indicia of coercion to force an early termination of the Importer contract, and in this sense the Court did not view the testimony in the light most favorable to plaintiff-appellant.

3. On page 4 of the Court's decision the Court stated ANAU gave notice it intended to submit the termination grievance to arbitration. There was no such claimed grievance by plaintiff-appellant as more fully appears from its original Brief, (pages 14-29) The submission to the Court of Arbitration was in form a request for Declaratory Judgment by ANAU. (*Vol 2, page 333 et seq. Appendix*)

We reserve our argued position as to each of the points of appeal but in this petition address ourselves to two positions:

Because of the mass of exhibits, all of which were admitted for the purpose of passing on the motion for directed verdict (Vol

7, p 1385) where the court may have over looked or misapprehended the pattern indicative of violations of the Anti trust statutes claimed unless the Court's attention is called to and further references to Exhibits and Appendix in that sense the court was not able to view the evidence in the light most favorable to the plaintiff-appellant, nor to give it the advantage of every fair and reasonable inference that the evidence might justify.

By reason of the above, the court may have overlooked or misapprehended evidence of coercion or intimidation showing a lack of "good faith" by appellees under *15 USC #1221 (e)*

Therefore, this petition is devoted to convincing this court that it has erred in its determination affirming directed verdict herein.

ARGUMENT

1. As indicated by this court (p-9) plaintiff-appellant must establish that appellees brought pressure on plaintiff-appellant but also their reason for doing so under *15 U.S.C. 1221 (e)*. The Court overlooked or misapprehended evidence to "suggest why ANAU would have wanted or needed to use coercion to force Overseas to terminate the importer contract. Pressure or coercion, we submit, may be wrought by an "Iron fist in a silk glove." The following evidence taken in the light most favorable to plaintiff-appellant, and the inferences therefrom, demonstrably establish such pressure and need but were not considered by the Court in the light most favorable to Plaintiff and Appellant.

2. Under the Importer Contract (*#72-2198 Appendix at page 21 (4)* the manufacturer expressly agreed in connection with licensing to "duly consider the interests of the Importer."

The manufacturer, induced plaintiff-appellant to believe it would be getting the Ro-80 Wankel car, (as indicated by numerous exhibits as late as April 22, 1971, when it was finally informed the Ro-80 was not to be imported to the United States) on May 20, 1970, *Exhibit 91*, appellees were still advising plaintiff-appellant that they had developed U.S. equipment for Ro-80 but couldn't tell *when* it would be available.

Plaintiff-appellant was required to use its facilities and helped in running tests with the U.S. Dep't of HEW to procure a U.S. Certificate of Conformity (See *Exhibits, P. 12* Appellant's Reply Brief. The testimony of Dr. Hans Sassor, engineer in charge of testing, etc. (*Vol 5, Appendix page 1099*), was that plaintiff-appellant was of great help to him in the test procedure; (*Vol. 5 Appendix page 1099*). (This was confirmed by Dr. Henn in his deposition (*Vol. 6, pages 1163-4*). Dr. Sassor further stated that the manufact irer would try to find a solution for the loyalty and technical help from plaintiff-appellant.

Mr. Gilliam Clark of Ethyl Corp. deposition was to the same effect (*Vol. 7 Appendix 1438-42*)(*Vol. 6 Appendix 1104*)Dr. Sassor became a part of the promotion and was interested in the promotion of Ro-80 in the U.S. (*Vol. 6, Appendix page 1101-3.*)

3. Appellees required a man from plaintiff-appellants to be sent to Germany for specialized training in the Ro-80 motor, which was done (*Vol. 6, Appendix, p. 1124, 1166-7*) (Mechanic's diploma *Exhibit 1087*)

It later developed (from deposition of Dr. Gunter Henn, Vice President of ANAU) that the manufacturer had no intention of exporting the Ro-80 to the U.S. The promotion and fraud perpetrated on plaintiff-appellant by the manufacturer, was "primarily for the purpose of building (the) licensing of the wankel motor," in the U.S. (*Vol. 6 p. Appendix 1163-71*). Postponement of termination date was essential and for the sole benefit of Appellees, until such time as plaintiff-appellant would no longer be useful in "promoting" appellees' licensing operation in the U.S.

Court said (P-9 of its Decision that when ANAU wrote its letter of April 15, 1971 (Ex-46) it was fully empowered to terminate the agreement under #12(1) of the agreement and no coercion was needed to achieve this end if termination was desired. Instead a two year extension was granted and requirements of #12(1) were waived to permit Overseas to terminate at anytime upon giving three months notice, and asserted here was no evidence to suggest why ANAU wanted or needed to use in above. We respectfully suggest that the Court did not apply applicable law and failed to consider factual matters in the light most favorable to Plaintiff-Appellant.

The need for the extension of termination, while appearing generous, was an obvious ploy, resulting in no benefits to Plaintiff-Appellant, since no NSU cars were produced for the American market after 1971. (2a (4) 1972-2198 Appendix) For practical purposes the importer contract was terminated as at Jan. 1, 1971.

While the right to terminate was given, the Court overlooked the fact that continued existence of the Importer Contract was essential to the success of Plaintiff's business. The right of Plaintiff-Appellant to cancel a profitable and desirable importership is of no value in that it is essentially the right to destroy its own business: *Alles Corporation* v. *Senco Products* Inc. 329 F^2 567 (6th PA 1964) 510-1

The Court did not consider *Exhibit 47*, Plaintiff-Appellant's reply, nor the explanation of that letter contained in the deposition of Dr. Henn. (*Vol. 6, Appendix 6, p. 1155-1163*) This Court, like the district court, adopted this evidence in the light most favorable to Appellees and not in the light most favorable to Plaintiff-Appellant. Other exhibits clearly indicate that the "pinching off" of cars was not due to a lack of production of NSU cars (*see Vol. 6 Appendix 1162*) (*Exhibit 883*) which indicates that NSU cars during year came off the line at 150,000 a year and ". . . .covering a sizeable slice of the auto market in Germany and also the importing nations.) (Also see Dr. Henn's deposition *Vol. 6-Appendix*) Neither was it due for lack of orders made by Overseas. Plaintiff-Appellant was required by ANAU to make a forecast of cars which it would buy in 1971 and Plaintiff-Appellant submitted a commitment (Ex. 1053) for a substantial number of cars Plaintiff-Appellant would purchase but received none. Also see *Exhibit 530*, Sept. 9, 1970 a request by Plaintiff-Appellant to examine back orders.

What was happening was that after the merger, some of the NSU cars were being phased out; the production of NSU cars decreased, while the production of Audi (NSU) cars increased. (*Vol. 6 Appendix p. 1162*) Old NSU cars were being re-labeled, and were and are being distributed thru Volkswagen channels. For example the NSU K-70 was designed by NSU engineers and is now produced by Volkswagen. (*Vol. 6, page 1106- 1124*) This car was promised to Appellants and is now being distributed by

Volkswagen, and bears Volkswagen emblems. (Also see *Exhibits 884-888*, showing name plates of NSU cars after merger.) The Court overlooked the interchangeability of NSU and Audi cars was recognized by Appellees in their service contracts, (*PX 44, par 3*, a part of Importer Contract dated Feb. 1, 1971) (*17 Appendix, 1972, 2198*) which defines "Contract goods shall mean Audi NSU motor vehicles, as well as original Audi NSU. Obviously as long as the licensing of the wankel motor was open for sale it was to the advantage of the manufacturer to string Plaintiff-Appellant along like the proverbial "carrot-on-the-stick," encouraging it to waste money on what the manufacturer knew was a futility. It is significant that seven days after the termination letter of April 15, 1971, (*Exhibit 46*) referred to by the Court on page 3 and 4 of the Decision, ANAU sent *Exhibit 117*, dated April 22, 1971, stating that Ro-80 would not be imported to the United States. Note in this connection, Plaintiff-Appellant's reply. (*Exhibit 47*)

The Court overlooked the cryptic letter of March 19, 1970, *Exhibit 89*, wherein ANAU claims it was not ready to deliver Ro-80 to U.S. for reasons too hard to explain; a personal visit was promised, which followed in September, 1970 (*Vol. 3, p. 547, 548, Appendix*), which appears in detail at page 38-40 of the original brief of Appellant.

Indicative of the concern of Appellees for a quick termination of the Importer Contract, is demonstrated by *Exhibit 53*, dated June 15, 1972, demanding immediate termination of the Importer Contract. Their further concern is demonstrated by filing of requests for Declaratory Judgment before the Court of Arbitrators, asking for a determination pursuant to *Exhibit 53* (*Vol 2 Appendix 332-368*). There is no basis in the evidence to establish any costs increase resulting from increased standards. From the testimony of the Engineer of ANAU handling tests at U.S. Dept. of HEW for ANAU it appears that no applications for certificates of conformity for any of the NSU cars had been made after the year 1969 (see general discussion thereon (*Vol. 6. p. 115-1119*) The number and dates of certificate of conformity issued by U.S. Dept. of HEW on ANAU cars appear in *Exhibit 1101*. In connection with the ploy relating to increase costs resulting from U.S. Dep't of HEW standards, the Court overlooked the evidence that certificates of conformity had already been issued

for the model year 1970 on the Ro-80 *Vol. 6 Appendix (Ex. 279)* Nor was the 1971, 1972 1200 C redesigned to conform to U.S. standards, after issuance of the earlier certificate of conformity. (*Vol 6. p. 1118-1119*) No applications for certificates of conformity on 1200C or Ro-80 could have been made by ANAU without testing by the U.S. Department of HEW, and no tests, appear to have been made after December 1969 (*Vol. 6 p. 1115-6*) Consequently, ANAU was in no position to export the Ro-80 or the 1200C in 1972 as it proposed in *Exhibit 176*, dated February 16, 1972, wherein the normal prices for said cars was doubled. Since it had made no plans to apply for certificates of conformity for 1972 on these two models, it could not have exported the cars to Overseas, even though Overseas might have ordered them. In this connection, the Court did not consider contra and supporting *Exhibit 49* dated February 25, 1972 in reply to *Exhibit 176*, *Exhibit 48* dated May 9, 1972, preceding letters in this connection, viz: *Exhibits 170, 171 and 172*. In light of these Exhibits, the Court did not view the testimony in the light most favorable to Plaintiff-Appellant. In concluding that prices were increased on said cars on the basis of small volume and increase in American safety standards, etc.; rather the reasonable inference would be that ANAU were deliberately overcharging to coerce plaintiff into a voluntary cancellation of the import contract.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant requests an opportunity for a rehearing on these points. Because of the fundamental nature of the question presented, it is requested that the rehearing be before the entire Court, sitting in banc.

Respectfully submitted,
BURKE AND WILSON

By /s/ WILFRED L. BURKE
Attorneys for Plaintiff-Appellant

Dated: June 14, 1975

No. 74-1651

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OVERSEAS MOTORS, INC., a Michigan corporation, ***Plaintiff-Appellant*** **-vs-** **IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK AKTIENGESELLSCHAFT, aka VOLKSWAGENWERK GMBH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, INC., (PORSCHE-AUDI DIVISION) a New Jersey corporation, jointly and severally,** ***Defendants-Appellees***	**ORDER**

Before: LIVELY and ENGEL, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiff-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF
THE COURT
John P. Hehman, Clerk

By /s/GRACE KELLER
Grace Keller
Deputy Clerk

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Solomon v. *United States* 276 F2d 669, 672, CA6, 1960, (Surplus Property Act. Mich) cert den. 365 U.S. 869 .. 37a
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Taylor v. *Cirino* 321 F2d 279, 281 CA6, 1963, Diversity, Ky. 39a
Tennant v. *Peoria & P.U.R. Ry.* 321 U.S. 29, 1943 ..... 54a
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TREATISES ON DIRECTED VERDICT GENERALLY

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#2529, pages 571-2-3 (as to Wilkerson); inferences generally, #2528, pages 563-571 ..... 55a
Yale Law Journal, Vol. 67, pages 188-204, 1957 ..... 50a
2 B W Barron & A. Holtzoff, Federal Practice & Procedure #1075, at 399-400 ..... 55a

EXCERPT FROM DISTRICT COURT DECISION, *OVERSEAS* RELATING TO STANDARD USED THEREIN

CASES RELIED ON BY DISTRICT JUDGE IN *OVERSEAS*, BASED ON STATE OF OHIO STANDARD

(EXCERPT FROM DISTRICT COURT DECISION ON OVERSEAS RELATING TO STANDARDS USED)

OVERSEAS MOTORS, INC. v. IMPORT MOTORS LIMTIED, INC.
Cite as 375 F.Supp. 499 (1974)

Directed Verdict

Procedure–After approximately five weeks of trial, it appeared that the plaintiff's remaining proof consisted of some fifteen depositions and several hundred exhibits. Colloquy in chambers at that time developed the certainty that defendants' counsel would present and argue a motion for a directed verdict at the close of plaintiff's proofs. The court then suggested and counsel agreed that the jury should read the remaining depositions and studied the exhibits not yet offered by plaintiff. Counsel agreed to an arrangement by which these materials could be considered along with the evidence already presented to the jury in determining defendants' motion. It should be noted that while counsel for defendants agreed to the procedure, they did not necessarily agree to the ultimate admissibility of either the deposition testimony or the exhibits. Equally important, while the court notified counsel for the defendants that for the purpose of the motion it would consider all of the testimony offered by the plaintiff, including testimony concerning settlement discussions (a portion of which had been excluded by the court during trial), it did so without prejudice to the defendants' right to continue their objections to any evidence they considered inadmissible in the event the motion for directed verdict was denied.

[40] *Standards for Directing a Verdict*[82]—A directed verdict is appropriate where there is a complete absence of proof on an

[82]. *See generally* 5A Moore, *supra* note 2, ¶50.02[1].

essential element of a party's cause of action or defense,[83] or where the proofs adduced in support of that element are so insignificant as to be the equivalent of no proof.[84] The precise level of non-persuasion required has been variously described, but in essence is reached whenever the facts, and any inferences which may reasonably be drawn from them, point so strongly toward the non-existnece of an essential element that no reasonable man could find for its existence.[85]

[41-43] Of course it is a well-established rule that the court must view the evidence in the light most favorable to the party against whom the motion is made.[86] Thus, no rational inference favoring the plaintiff may be rejected because of conflicting evidence or inferences or questions as to a source's credibility.[87] Even so, once a conclusive deficiency of proof is shown, the court is obligated to direct a verdict. Justice and the integrity of the law itself permit nothing less.

> "A directed verdict is a device to save time and trouble involved in lengthy jury determination. It is [also] something more. It is a method for protecting neutral principles of law from powerful forces outside the scope of law—compassion and prejudice."[88]

STATE OF OHIO CASES RELIED ON BY DISTRICT JUDGE IN *OVERSEAS* AS BASIS OF STANDARD OF SUFFICIENCY

CASES RELIED ON BY JUDGE FEIKENS, DISTRICT JUDGE IN *OVERSEAS MOTORS Inc. v. IMPORT MOTORS*

[83] *See, e.g.*, Louisville & N.R.R. v. Chatters, 279 U.S. 320, 331-32, 49 S.Ct. 329, 73 L.Ed. 711 (1929); Riddle v. Datko, 448 F.2d 408, 409 (3rd Cir. 1971).

[84] *See* Boeing Co. v. Shipman, 411 F.2d 365, 372-76 (5th Cir. 1969).

[85] *See, e.g.*, Brady v. Southern R.R., 320 U.S. 476, 479-80, 64 S.Ct. 232, 88 L.Ed. 239 (1943); Fortunato v. Ford Motor Co., 464 F.2d 962, 965 (2d Cir. 1972).

[86] *See, e.g.*, Teti v. Firestone Tire & Rubber Co., 392 F.2d 294, 297 (6th Cir. 1968).

[87] *See, e.g.*, Domany v. Otis Elevator Co., 369 F.2d 604, 608 (6th Cir. 1966), cert. denied, 387 U.S. 942, 87 S.Ct. 2073, 18 L.Ed.2d 1327.

[88] Rutherford v. Central Ill. R.R., 278 F.2d 310, 312 (5th Cir. 1960), cert. denied, 364 U.S. 922, 81 S.Ct. 288, 5 L.Ed.2d 261.

***LTD.* 375 F Supp 499 (1974) Pertinent Page thereon on following page)**

DOMANY v. *OTIS ELEVATOR CO.* 369 F2d 604, 608, 6CA 1966 cert den 387 U.S. 942

"It is a fundamental rule of our jury system that where there is a question as to the existence of certain alleged facts, the function of determining such facts rests with the jury and not the court.

> '(W)e note the established rule that in the face of a motion to direct the jury to return a verdict for one of the parties to an action, * * * the court must construe the evidence most strongly in favor of the party against whom the motion is made, and, where there is substantial competent evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in disposing of such a motion.' Durham v. Warner Elevator Mfg. Co., 166 Ohio St. 31, 36, 139 N.E.2d 10, 14. See also Hilleary v. Bromley, 146 Ohio St. 212, 64 N.E.2d 832; Botto v. Fischesser, 174 Ohio St. 322, 189 N.E.2d 127.

In considering the case most favorably to the party against whom the motion is made, the court is required to take into account any reasonable inferences that may be drawn from the facts in evidence. Purdy v. Kerentoff, 152 Ohio St. 391, 89 N.E.2d 565; Wilkeson v. Erskine & Son, 145 Ohio St. 218, 61 N.E.2d 201."

TETI v. FIRESTONE TIRE AND RUBBER COMPANY
Cite as 392 F.2d 294 (1968)

[2] The first question raised on this appeal is whether the trial judge erred in ordering a directed verdict in favor of defendant. In considering a motion of this nature, the trial judge must view the evidence in the light most favorable to the plaintiff and must make all permissible inferences in favor of the plaintiff. Domany v. Otis Elevator Company, 369 F.2d 604 (C.A.6), cert. den. 387 U.S. 942, 87 S.Ct. 2073, 18 L.Ed.2d 1327; Durham v. Warner Elevator Mfg. Co., 166 Ohio St. 31, 139 N.E.2d 10.

STANDARD OF SUFFICIENCY AS CITED BY SIXTH CIRCUIT IN *FORTNER ENTERPRISES V. UNITED STATES STEEL* (Relied on as standard by Sixth Circuit)

Portion of Fortner, supra cited in OVERSEAS (complete quotation of Standard used in Decision in Sixth Circuit)

STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS CITED BY SIXTH CIRCUIT COURT OF APPEALS AND ACTUAL QUOTATION FROM DECISION OF SIXTH CIRCUIT COURT OF APPEALS AND ACTUAL QUOTATION FROM DECISION OF SIXTH CIRCUIT IN OVERSEAS MOTORS, INC, v. IMPORT MOTORS LTD, INC.

FORTNER ENTERPRISES v. *UNITED STATES STEEL*, 452 F2d 1095, 1097 6CA 1971 Antitrust

"To determine whether a d.v is appropriate, the governing principle is that a verdict may properly be directed only when, without weighing credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. Where there is conflicting evidence or insufficient evidence to make a 'one way' verdict possible, a directed verdict is improper. Brady v Southern Ry Co. 320 U.S. 476, 479-480 (1943) 5A Moore's Federal Practice #50.02 (1) pp 2321,2. An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify. Continental Ore Co. v. Union Carbide & Carbon Corp 370 U.S. 690, etc. (1962) 5 A Moore's Federal Practice 50.02 (1) pp 2326,7

OVERSEAS MOTORS, INC. v. Import Motors, Ltd., Inc. et al _____F2d_____ 1975, 6CA

(Appendix I attached, p 9) (PORTION OF *FORTNER* supra, cited in *Overseas*, supra, relating to Standard of Sufficiency used by Court of Appeals 6CA)

"Appellate review of the action of a district court in granting a motion for directed verdict demands the most painstaking review of the evidence to make certain that what is claimed not to be there, in fact isn't.

'To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict . . . .An appellate court too is bound to view the evidence in the light most favorable to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify'' '*Fortner Enterprises Inc.* v. *United States Steel Corp.* 452 F2d 1095 (6th Cir. 1971)'

NOTE: IN QUOTED EXCERPT FROM OVERSEAS, supra, THE SIXTH CIRCUIT DELETED FROM *FORTNER* STANDARD, THE FOLLOWING SENTENCE: ''WHERE THERE IS CONFLICTING EVIDENCE OR INSUFFICIENT EVIDENCE TO MAKE A 'ONE-WAY' VERDICT POSSIBLE, A DIRECTED VERDICT IS IMPROPER.''

STANDARDS OF SUFFICIENCY IN SIXTH CIRCUIT, FOLLOWING STANDARDS DELINEATED UNDER THE LAW OF MICHIGAN

STANDARDS OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS FORMULATED IN SIXTH CIRCUIT FOLLOWING STANDARD AS DELINEATED UNDER THE LAW OF THE STATE OF MICHIGAN

Brunswick Balke Collender v. *Foster Boat Co.*, 88 CA6 Mich, 1944 diversity

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''Upon the question whether Brunswick first breached its contract being raised by a motion for directed verdict and a motion for judgment notwithstanding the verdict, the evidence must be considered in the light most favorable to the plaintiff, and all conflicts resolved in its favor. Michigan law is, in this respect, consonant with general law. Thurkow v. City of Detroit, Michigan, 292 Mich. 617, 291 N.W. 29, and cases there cited. So viewed, there was evidence to sustain the verdict.''

Connors v. *American Casualty Co.* 330 F2d 505 6CA, 1964 Mich. diversity

[506]''In considering such a motion, the District Judge was required to consider the evidence, as well as inferences deducible therefrom, in the most favorable light to plaintiff.''

[507]''In our judgment, the court would not have been justified in withdrawing this issue from the jury. Cf. Rogers v. Great Northern Life Insurance Co., 284 Mich. 660, 279 N.W. 906; Phillips v. United States Benevolent Society, 120 Mich. 142, 147, 79 N.W. 1.''

Hull v. *Holiday Inns of America, Inc.*, 478 F2d 224 CA6, 1973 Mich. diversity

[225] [1] In considering a motion for a directed verdict the judge must consider all of the testimony in the light most favorable to the plaintiff. Lones v. Detroit, T. &I. R. Co., 398 F.2d 914 (C.A. 6) cert. den. 393 U.S. 1063, 89 S.Ct. 714, 21 L.Ed.2d 705; Serratoni v. Chesapeake and Ohio Ry. Co., 333 F.2d 621, 626 (C.A.6) cert. den. 379 U.S. 960, 85 S.Ct. 648, 13 L.Ed.2d 555; Kravat v. Indemnity Insurance Company of North America 152 F.2d 336 (C.A. 6); Hinton v. Dixie Ohio Exp. Co., 188 F.2d 121, 124 (C.A. 6).

Jenkins & Reynolds Co. v. *Alpena Portland Cement Co.* 147 F2 641, (642, 643, 644) 6th Cir, 1906, Mich. diversity.

[643] ''The motion (for directed verdict) should be overruled if among the evidence that has been introduced there is substantial evidence favoring such such facts of the plaintiff's case, and this though among it also there is evidence opposing such substantial evidence and conflicting therewith, no matter how strong such opposing evidence is. In passing on such motion it is not the province of the court to compare with that which opposes or conflicts therewith. The latter should be completely ignored, as much so as if it were out of the case, and the attention of the court should be confined to the evidence favoring such facts of the plaintiff's case, and to a determination of its positive character, i.e whether it is substantial or not. It is the jury's province to make such a comparison. It is never the court's province to do so except after verdict on a motion to set it aside and grant a new trial.

[644]'' . . .The question presented by the assignment of the granting of said motion as error, therefore, is whether, taking the most

favorable view of the evidence so introduced and all inferences reasonably drawn therefrom, there was among it any substantial evidence favoring the ultimate or constitutive facts of plaintiff's case, all of which were put in issue: or, in other words, taking such view, is it to be said that reasonable men may fairly differ as to whether the evidence among it favoring such facts established them, or that all reasonable men would conclude that it did not."

KRAVAT ET AL V. *INDEMNITY CO OF NORTH AMERICA* 152 F2d 336,1945 (cited with approval in HULL V. HOLIDAY INN 478 F2d 225 (1973)

"In McGrath v. Hargraves, 310 Mich. 510, 512, 17 N.W.2d 733, 734, this statement was made: "It is the unvarying rule in this State that, in passing on a motion for a directed verdict at any stage of a case, the court must consider the evidence in the light most favorable to the party against whom the direction is sought and assume the same to be true." Again, the highest court in Michigan said that, on the motion of a defendant for a directed verdict, the testimony of the plaintiff "and the legitimate inferences to be drawn from established facts must be viewed most favorably to plaintiff." McDuffie v. Root, 300 Mich. 286, 292, 1 N.W.2d 544, 546. See also Fisher v. Grand Trunk Western Railroad Co., 306 Mich. 95, 98, 10 N.W.2d 321."

SERRATONI V. *CHESAPEAK & OHIO RY.* 333 F2d,621, 626,CA6,1964,cert den. 379 U.S. 960 Mich. diversity

"Further, Michigan law does not favor directed verdicts or judgments entered by the trial judge notwithstanding the verdict of a jury. Justice Cooley enunciated this principle in Detroit & Milwaukee Railroad Co. v. Van Steinburg, 17 Mich. 99, 120: "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility." This view has been reiterated and followed many times: Carver v. Detroit & Saline Plank Road Co., 61 Mich. 584, 28 N.W. 721 (1886); Stowell v. Standard Oil Co., 139 Mich. 18, 102 N.W. 227 (1905); Burghardt v. Detroit United Railway, 206 Mich. 545, 173 N.W. 360, 5 A.L.R. 1333 (1919), and reemphasized in recent years: Kaminski v. Grand Trunk Western Railroad Co., 347 Mich. 417, 79 N.W.2d 899 (1956); Ware v. Nelson, 351 Mich. 390, 88 N.W.2d 524 (1958); Patterson v. Pennsylvania Railroad Co., 238 F.2d 645 (C.A.6, 1956).

In this last case reversing a directed verdict in a Michigan grade crossing accident, Judge Martin quoted Justice Cooley further, and added a comment:

"[T]he great legal authority said:

'When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair minded men may well differ.'

"Some of us have noted a modern tendency—perhaps a growing one— to give mere lip service to these sound principles. Trial by jury is our established constitutional safeguard against assumption of unwarranted judicial authority and should be honored by steadfast observance * * *." Patterson v. Pennsylvania Railroad Co., supra, 238 F.2d at 650.

[6] Finally, in terms of general legal principle, Michigan law requires us, when reviewing the grant of judgment for defendant notwithstanding a jury verdict for the plaintiff, to view the conflicting facts and inferences from the point of view favorable to plaintiff—this being the point of view which was accepted by the jury. Ware v. Nelson, supra; Cabana v. City of Hart, 327 Mich. 287, 42 N.W.2d 97, 19 A.L.R.2d 1333 (1950)."

Smith v. *Peters* 482 F2d799,801 CA6,1973 Diversity Mich.

"In our opinion, the District Court erred in holding that the manner of commencement of an action in the federal courts is an "outcome determinative question" which a federal court, under Erie R. R. v. Tompkins, *supra*, is required to determine under state, rather than federal, law. In our view the decision as to when the action was commenced determines only whether the action is to continue; it is purely procedural, and does not relate to the substantive issues of the case.

This question, however, was set to rest by the Supreme Court in Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), which case was not considered by the District Judge in his Memorandum Opinion."

SOLOMON v. *United States* 276 F2d 669,672, 6CA,1960 (Surplus Property Act, Mich. Cert Den. 364 U.S. 890

"Although the Government's evidence was contradicted in some respects, it is well settled that upon a motion of a defendant for a directed verdict, the trial judge should overrule the motion unless, viewing the evidence in the light most favorable to the plaintiff there would be no substantial evidence to support a jury verdict if returned for him. Hinton v. Dixie Ohio Exp. Co. 6 cir., 188 F2d, 121,124; Scott v. United States 6 cir, 161 F2d 1009,1012."

Sove v. *Smith* 355 F2d 264,268 CA6,1966, Diversity Mich.

". . . . . ., and it is familiar Michigan and general law that factual issues will not be withdrawn from a jury unless they are such "that all reasonable men must draw the same conclusion from them." Grand Trunk R. Co. of Canada v. Ives, 144 U.S. 408, 417, 12 S.Ct. 679, 683, 36 L.Ed. 485 (1891). See also Beach v. City of St. Joseph, 192 Mich. 296, 301, 158 N.W. 1045 and earlier and later Michigan cases."

STANDARDS OF SUFFICIENCY AS FORMULATED IN SIXTH CIRCUIT UNDER STATE STANDARDS OTHER THAN STATE OF MICHIGAN

STANDARDS OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS FORMULATED IN SIXTH CIRCUIT UNDER STATE STANDARDS OTHER THAN THE STATE OF MICHIGAN

Crown Cork & Seal v. *Morton* 417 F2d,921,926 Ca6,1969,diversity, Tenn. .....

Domany v. *Otis Elevator Co.* 369 F2d 604,608, 6CA,1966 cert den 387 U.S. 942, Ohio diversity .....

Dean v. *Southern Railway Co* 327 F2d 757,765, 6CA,1964 Tenn,diversity .....

Gilreath v. *Southern Rw Co 323* F2d 158,162, Ca6,1963 Tenn diversity .....

Hinton v. *Continental Ins. Co.* 188 F2d 121,124, 6CA,1951 Ky. diversity .....

Holt v. *Continental Ins. Co.* 440 F2d 652, 6CA,1971 Tenn. diversity .....

Kresge Co. v. *Holland* 158 F2d 495,498 6CA Diversity Ohio

Lones v. *Detroit, Toledo & Ironton Rr Co.* 398 F2d 914,919, 6CA,1968 Ohio diversity .....

Lovas v. *Gen. Mo. Corp* 212 F2d 805,807, 6CA,1954,Ohio diversity .....

McDowell v. *Bratcher* 265 F2d 261, 263, 6Ca,1959, Kentucky diversity .....

Miller v. *Cincinnati & Texas Pac. Rv. Co.* 317 F2d 693,700, CA6,1963 FELA .....

Minton v. *Southern Ry* 368 F2d 719, 720, 6CA,1966 Tenn. diversity .....

O'Donnell v. *Geneva Metal Wheel Co.* 190 F2d 59,60, CA6,1950, Ohio diversity .....

Pergola v. *Penn Ry Co.* 311 F2d 837,838 CA6 1963, Ohio diversity .....

Price v. *Firestone Tire and Rubber Co.* 321 F2d 725,726, CA6,1963 Tenn. Diversity .....

Scott v. *Sove* 161 F2d 1009,1012 CA 1947 Tenn. diversity

Taylor v. *Cirino* 321 F2d 279,281, CA6,1963 Diversity Ky.

Teti v. *Firestone Tire and Rubber Co.* 392 F2d 294,297, CA6,1968 Ohio Diversity .....

Trice v. *Commercial Union Assurance Co.* 397 F2d 889,891 6CA 1968, Tenn. diversity .....

Trivett v. *New York Life Ins. Co.* 283 F2d 441, 443-444, 6Ca,1969 Ky. diversity .....

STANDARDS OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT UNDER "Boeing"; RIVES J. DISSENT AND RELATED CASES

STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS FORMULATED IN

BOEING COMPANY V. *SHIPMAN* 411 F2d 365 (1969),374-5, AS OPPOSED TO DISSENT BY JUDGE RIVES OPTING FOR *LAVENDER* RULE)

"On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach differenc reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.[1]§"

(citations under note 16,page 375 omitted)

EXCERPTS OF DISSENT OF JUDGE RIVES IN *BOEING*, supra (pp 392-3-4)

"First, the majority expressly overrules the Supreme Court's own sufficiency test set our in *Lavender* v. *Kurn*, supra, 327 U.S.at 653. . .,and rejects *Planters Mfg Co.* v. *Protection Mut. Ins. Co* 5 Cir 1967, 380 F2d 862,874* *The majority in so doing*

commits constitutional error, for the Lavender test represents but one articulation of several constitutional formulas used by the Supreme Court.

(*cert den. 289 U.S. 930, emphasis supplied)

"Second, the majority simply has no authority to 'promulgate' any one standard when the Supreme Court itself has prescribed a number of them (27) (citations omitted) and has left the door open for further formulas to be developed. . . . . "

Third, I disagree with the new standard 'established' by the majority because it is at least misleading in its use of the term 'substantial' if it is not erroneous. The word 'substantial' used in its legal sence, can equally connote either a *qualitative* or a *quantitative* meaning. . . . . I note that notwithstanding all the variations which the Supreme Court has played on its sufficiency theme, I have been unable to find a single instance in which the Supreme Court has used "substantial" (29) in any of its articulations of the constitutional standards. (citations in footnote ,29 omitted)

"While some may consider a single formula for the standard to be laudable in the name of uniformity, I think it is unnecessary. I seek to achieve the *purpose* of the Seventh Amendment-preservation of the resolution of factual disputes to the jury alone-not to establish one or more preferable formulas for the standard. And this purpose is perhaps best amplified in the language of *Lavender* and *Planters*. If I had to choose a single formula, my choice would lie among three: (a) the language of *Lavender*; (b) the "Brady rule" quoted heretofore on pages 389-390 and again referred to on page 393; (c) the same formula as that for granting a summary judgment quoted in footnote 23, supra."

Judge Rives was hopeful that the case might go up on certiorari (378,footnote2) but since judgment was in appellee's favor he did not see it. However, Judge Rives still adheres to his position. (See *Robertson* v. *Douglas SS Co* 510 F2d 829, 837 5ca, 1975)

RELATED CASES

POGUE v. *GREAT ATLANTIC & PACIFIC TEA COMPANY* 242 F2d 575, 5 CA 1957 (576,582)

RIVES, Circuit Judge.[576]

"In reviewing the summary judgment, we need consider only that evidence most favorable to the party against whom the judgment was rendered, giving that party the benefit of all favorable inferences that may reasonably be drawn from the evidence.[1]"

[582]"The kind of jury trial to which the parties are entitled in Federal Courts under Rules 38 and 39 of the Federal Rules of Civil Procedure, 28 U.S.C.A., is that preserved by the Seventh Amendment to the Constitution, to which the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, is of course subservient. Wright v. Paramount-Richards Theatres, 5 Cir., 198 F.2d 303, 305; Reuter v. Eastern Air Lines, 5 Cir., 226 F.2d 443, 445; Reynolds v. Pegler, 2 Cir., 223 F.2d 429, 433, 434."

(cited in *Trivett* below)

TRIVETT v. *NEW YORK LIFE INS. CO.* 283 F2d 441, 443, 4, 6CA, 1960 Ky diversity

P , Circuit Judge (dissenting)

"The sufficiency of certain evidence to raise a question of fact for the jury * * * should not be controlled by state law."[3]

As times goes on it becomes increasingly clear that, as often stated by the Fifth Circuit, "[t]he kind of jury trial to which the parties are entitled in Federal Courts under Rules 38 and 39 of the Federal Rules of Civil Procedure, 28 U.S.C.A., is that preserved by the Seventh Amendment to the Constitution, to which the doctrine of Erie Railroad Co. v. Tompkins, * * * is of course subservient." Pogue v. Great Atlantic & Pacific Tea Company, 5 Cir., 242 F.2d 575, 582.[4]

This is exactly the same principle applied by the Supreme Court in Byrd v. Blue Ridge Cooperative, 356 U.S. 525, 537, 78 S.Ct. 893, 901, 2 L.Ed.2d 953, where the Court said: "An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence— if not the command—of the Seventh Amendment, assigns the decisions of disputed questions

of fact to the jury. * * * The policy of uniform enforcement of state-created rights and obligations, * * * cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury.

I am not suggesting that the Byrd case dealt with the precise question presented in the case now before us. It is plain that the Supreme Court has not thus far directly expressed itself upon the question which I here discuss.[5] But the clarity with which the Court there declares the principle which underlies the decision of the Fifth Circuit in the Pogue case, to my mind furnishes clear evidence that when it does find occasion to speak, the Supreme Court will agree with what was said in the Pogue case.

In my opinion there are compelling reasons for regarding the position of the Fifth Circuit as the only tenable one. Such is also the view of the Courts of Appeals for the Fourth, Ninth and Tenth Circuits. Davis Frozen Foods v. Norfolk Southern Ry. Co., 4 Cir., 1953, 204 F.2d 839, 842; State of Washington v. United States, 9 Cir., 1954, 214 F.2d 33, 40, Smith v. Buck, 9 Cir., 1957, 245 F.2d 342, 349; Allen v. Matson Navigation Company, 9 Cir., 1958, 255 F.2d 273, 281, 282.[6] Diederich v. American News Co. 10 Cir., 1942, 128 F.2d 144; Bashman v. City Bus Co., 10 Cir., 1955, 219 F.2d 517, 52 A.L.R.2d 582; Miller v. Irby, 10 Cir., 1955, 227 F.2d 942.

As noted in Dick v. New York Life Ins. Co., 359 U.S. 437, 445, 79 S.Ct. 921, not all of the courts of appeals have agreed upon this proposition. An examination of those cases which have purportedly followed state decisions as to what constitutes a sufficient case for the jury convinces me that in the main they are distinguishable either on the ground that the court found it unnecessary in the particular case to pass upon this point, or because the case really involved a problem of state substantive law such as the existence of presumptions and the location of burden of proof.[7]

ROBERTSON v. DOUGLAS SS. CO 510 F2d 829,837, CA5,1975,Jones Act (RIVES J. still adhering to his dissent in *Boeing*,opting for Constitutional Standard)

". . . . . I adhere to the view expressed in my dissenting opinion in Boeing Company v. Shipman, 5 Cir. 1969, 411 F.2d 365, and therefore think that the standard for judging the sufficiency of the evidence to require submission of a case to a jury in F.E.L.A. cases, Jones Act cases, and all other jury cases is the same constitutional standard. I think that the evidence in this case as recited in the majority opinion met the constitutional standard. I therefore specially concur."

PLANTERS MFG. Co. v. *Protection Mut Ins. Co.* 380 F2d 869,870-1-2-3-4 5CA, 1967, Diversity, Miss. claim under insurance policy Cert.Den. 389 U.S.930

[870]"The first point urged by appellant is that in determining the sufficiency of the evidence to raise a question of fact for the jury in diversity cases, federal courts must apply a federal test. The Supreme Court has yet to settle the conflict which exists among the courts of appeals on this issue."

(footnotes omitted)

[871]"However, the Court's decisions in Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), and Simler v. Conner, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963), strongly suggest that the question will eventually be resolved in favor of the federal test. In *Byrd*, the issue was whether a federal court sitting in diversity was bound under the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938), to follow a decision by the Supreme Court of South Carolina which, in state court, would have made the trial judge the trier of fact on the question whether Byrd was covered by workmen's compensation. The Court refused to permit state law to divest a federal jury of its normal function. In the course of the opinion, it said:

> "Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.
>
> We think that in the circumstances of this case the federal court should not follow the state rule. *It cannot be*

gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." Byrd, supra, 365 U.S. at 538, 78 S.Ct. at 901. (Emphasis added.)

To permit state law to dictate when a federal trial judge must take questions of fact from a jury by means of a directed verdict or a judgment n. o. v. seems hardly less disruptive of the federal judge—jury relationship than assigning the task of resolving factual disputes to the trial judge initially.

The question posed in *Simler*, another diversity case, was whether federal or state law would determine if a controversy was equitable in nature and triable to the court, or legal and triable to a jury. The Court said:

> "[T]he right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. * * * Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." Id, 372 U.S. at 222, 83 S.Ct. at 610.

If the seventh amendment requires uniformity in the exercise of the jury trial right in the federal courts, surely that ~~assumes~~ 45 uniformity in the exercise of the power to direct a verdict or grant a judgment n. o. v."

(Court opts for Lavender Rule 873)

[874]"It is the seventh amendment which governs the role of the jury in the courts of the United States, and we perceive no rational basis for the proposition that it means one thing in FELA cases quite another in other actions. That the Supreme Court shares this view is indicated, we think, in the following excerpt from *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355 (1962):

"This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to ~~trial~~ TRIAL by jury. *As in cases under the Jones Act * * * and under the Federal Employers' Liability Act * * * trial by jury is part of the remedy. Thus the provisions of the Seventh Amendment, noted above, are brought into play.* * * * As we recently

stated in another diversity case, *it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'* " Id. at 360, 82 S.Ct. at 784. (Emphasis added).

STANDARDS OF SUFFICIENCY AS APPLIED IN SIXTH CIRCUIT UNDER *BRADY, BYRD, CONTINENTAL, ERIE, GALLOWAY, LAVENDER, SIMLER, TENNANT AND WILKERSON* RULES

STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS APPLIED IN SIXTH CIRCUIT UNDER *BRADY RULE (BRADY* v. *SOUTHER RY CO.* 1943 320 U.S. 476, 479-480.

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such disrection of the trial the result is saved from the mischance of speculation over legally unfounded claims." (citations omitted)

EXCERPTS FROM 5 A MOORE'S FEDERAL PRACTICE ON *BRADY* RULE #50.02 (1),pp 2321-2

"Since that time (date of *Brady* Rule) although they have used many different formulations, the federal courts have been reasonably consistent in the application of the *Brady* rule, that a verdict may properly be directed when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict./[17] But *where there is conflicting evidence, or there is insufficient evidence to make only a 'one-way' verdict possible, a directed verdict is improper.*[18] (citations under 17 and 18, pp2321,2,3,4, omitted)

(later case citations appear in 5 A. *MOORE'S FEDERAL PRACTICE* Supplement,(for pp 23,2322) at pp19-20-21) and include *Crown Cork & Seal Co.* v. *Morton Pharmaceuticals, Inc.* (*CA 6th*,1969, 417 F2d 921 and *Fortner Enterprises, Inc.* v. *United States Steel Corp* (*Ca6th*,1971) 452 F2d 1095, cert den. 406 U.S. 919. (both cases citing Treatise)

CASES FOLLOWING BRADY RULE IN THE SIXTH CIRCUIT COURT OF APPEALS

GREER v. *UNITED STATES* 408 F2d 631,635 (CA6,1969 (Fed. tax claim)

REEVES v. *POWER TOOLS* 474 F2d 375,380 (CA6,1973 (Tenn.) diversity (but see *Scott* v. *Sove* 161 F2d 1009,1012,CA6,1947 (Tenn.) diversity following "substantial evidence rule) and 6CA cases cited at 1012 therein)

DOWDELL v. *U.S. INDUSTRIES,INC.* 495 F2d 641 CA6,1974, 642 (also citing *Continental Ore Co.* v. *Union Carbide & Carbon* 370 U.S. 690; and *Fortner Ent. Inc.* v. *United States Steel Corp* Ca6,1971 452 F2d 1095,cert. den. 406 U.S. 919)

Rodriquez v. *Del Ray Connecting Ry.* 473 F2d 818,820 6Ca,1973 FELA

STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS APPLIED IN THE SIXTH CIRCUIT UNDER STANDARD OF *BYRD* (*BYRD* v. *BLUE RIDGE COOPERATIVE* 356 U.S. 525, 537-8-9

[537-8]". . . . . The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command —of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. *Jacob* v. *New York*, 315 U.S. 752. The policy of uniform enforcement of state-created rights and obligations, see, *e. g.*, *Guaranty Trust Co.* v. *York*, *supra*, cannot in every case exact compliance with a state rule — not bound up with rights and obligations— which disrupts the federal system of allocating functions between judge and jury. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91 . . . . . " (footnotes omitted)

[539]". . . . Perhaps even more clearly in light of the influence of the Seventh Amendment, the function assigned to the jury 'is an essential factor in the process for which the Federal Constitution provides.' *Id.*, at 95. Concededly the *Herron* case was decided before *Erie R. Co.* v. *Tompkins*, but even when *Swift* v. *Tyson*, 16

Pet. 1, was governing law and allowed federal courts sitting in diversity cases to disregard state decisional law, it was never thought that state statutes or constitutions were similarly to be disregarded. *Green* v. *Neal's Lessee*, 6 Pet. 291. Yet *Herron* held that state statutes and constitutional provisions could not disrupt or alter the essential character or function of a federal court." (footnotes omitted.)

Campbell v. *Oliva* 424 F2d 1244, 1245,CA6,1970 Tenn. diversity

Trivett v. *New York Life Ins.Co* 283 F2d 441, 444, CA6,1960,diversity Ky.

Comment: *MULTIPLE SUFFICIENCY TESTS IN FEDERAL COURTS:* THE SCOPE OF LAVENDER *UTAH LAW REVIEW*,1970 p 158 n 34

Comment: *DIRECTION FOR DIRECTED VERDICT: A* COMPASS FOR FEDERAL COURTS,Cooper, 55 Minn. Law Rev. 903,981-2

Miller v. *Davis* 507 F2d 308,313 6CA 1974, Diversity ky

Smith v. *Peters 482* F2d 799 (801) 6CA 1973 Mich. diversity

BYRD v. *BLUE RIDGE COOPERATIVE* 356 U.S. 525,1957,536,537,539

STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS APPLIED IN SIXTH CIRCUIT UNDER *CONTINENTAL ORE CO CONTINENTAL ORE CO.* V. *STANDARD UNION CARBIDE & CARBON CORP*, 370 U.S. 690,696,700,1,1961

"The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports,

even though contrary inferences might reasonably be drawn.[6]''

Amerco Marketing Co. of Memphis, Inc. v. *Myers,* 494 F2d 904,911 Diversity-Ky 6ca

Baker v. *Baltimore & Ohio RR Co* 502 F2d 638,1974 6CA FE-LA,643,6CA

Campbell v. *Oliva* 424 F2d 1244 (1970)Tenn. Diversity,1245 6ca

Champion Oil Service Co. v. *Sinclair Ref. Co.* 502 F2d 709,713, 1974, antitrust.6ca

Dowdell v. *U.S. Industries, Inc.* 495 F2d 641, 642-3,Diversity, 6ca,1974

Fortner Enterprises, Inc. v. *United States Steel Corp* 452 F2d 1095,1097,1971 antitrust, Ohio

Rodriques v. *Del Ray Connecting Ry* 473 F2d 819 6ca,1973 FELA,820

STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS APPLIED IN SIXTH CIRCUIT UNDER *ERIE* RULE (*ERIE R. CO.* V. *TOMKINS* 304 U.S.64,78-9,1937, as supplemented by *STONER* V. *NEW YORK LIFE INS. CO.* 311 U.S. 464,467, 1940

''Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its

[6] As Professor Moore has indicated, ''In ruling on the motion [for directed verdict] the trial court views the evidence in the light most favorable to the party against whom the motion is made. On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.'' 5 Moore's Federal Practice 2316 (2d ed., 1951). See *Pawling* v. *United States,* 4 Cranch 219; *Gunning* v. *Cooley,* 281 U.S. 90; *Tennant* v. *Peoria & P.U.R. Co.,* 321 U.S. 29. Cf. *Smith* v. *Reinauer Oil Transport,* 256 F.2d 646, 649 (C.A. 1st Cir.).

The same rule governs in ruling upon motions for directed verdict in treble damage suits under the antitrust laws *Schad* v. *Twentieth Century-Fox Film Corp.,* 136 F.2d 991, 993 (C.A. 3d Cir.); *Wisconsin Liquor Co.* v. *Park & Tilford Distillers Corp.,* 267 F. 2d 928, 930 (C.A. 7th Cir.). Cf. *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655; *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473.

Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ''general,'' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

''. . . . . Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invation of the authority of the State and, to that extent, a denial of its independence.' ''

Trivett v. *New York Life Ins. Co.* 283 F2d,441,442, CA6,1960,diversity Ky.

For Treatise analysis of *Erie* see *DIRECTIONS FOR DIRECTED VERDICTS:* A COMPASS FOR FEDERAL COURTS,Edward F. Cooper, 55 *MINNESOTA LAW REVIEW* 903, 978- 981

Kurland, *MR JUSTICE FRANKFURTER, THE SUPREME COURT AND THE ERIE DOCTRINE IN DIVERSITY CASES* 67 Yale L.J. 187,188-204,1957

QUIGLEY, *Congressional Repair of the Erie Derailment* 60 Mich. Law Review 1031,1059 (1962)

J.S.Wright *THE FEDERAL COURTS AND THE NATURE AND QUALITY OF STATE LAW* 13 Wayne L.Rev.(Mich.) 317,1967

McCoid, Hanna v. Plumer: *THE ERIE DOCTRINE CHANGES SHAPE* 51 VA L. Rev. 884 (1965)

Wright and Miller Federal Practice #2525,p 551-2 opting for federal test, that ''there is a strong federal policy allowing state rules to disrupt the judge-jury relationship in the federal courts'' under pronouncement in *Byrd* v. *Blue Ridge Rural Electric Cooperative Inc.* 356 U.S. 525,537,8,9 and that this policy outweighs the policy of the *Erie* doctrine

Smith v. *Peters,* 482F2d 799,801 CA6,1973 Mich. diversity

***STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT* AS APPLIED IN THE SIXTH CIRCUIT UNDER *GALLOWAY* V. *UNITED STATES*,319 U.S. 372,395,1942**

"Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence," or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from "the rules of the common law" which the Amendment requires to be followed. If there is abuse in this respect, the obvious remedy is by correction on appellate review."

As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances."

STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS DELINEATED IN THE SIXTH CIRCUIT UNDER THE LAVENDER RULE

LAVENDER v. *KURN U.S.* 327 U.S. 645,654,1945

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Dixon v. *Penn Cent.* 481 F2d 833,839 6CA,1973 Ohio FELA

Highfill v. *Louisville & Nashville R.Co* 154 F2d 874 6Ca,1946 FELA, 876

Hutchins v. *Akron, Canton & Youngstown R.Co.* 162 F2d 189, 192 6CA, FELA

Sweeney v. *American SS Co.* 491 F2d 1085,1089, 6CA,1974, Jones Act

SEE: MULTIPLE SUFFICIENCY TESTS IN FEDERAL COURTS. *THE SCOPE OF LAVENDER UTAH LAW REVIEW, 1970* p 155-161

p 156,n. 10, "state test controls in Second and *Sixth* circuits."

Discussion of *Lavender* in relation to *Boeing* (*Boeing Co* v. Shipman 411 F2d 365 (373-7) 5CA,1969 is at pp 155,157, 158,159 in *UTAH*, supra

Comment: *Wright & Miller Federal Practice* #2525,p 555.

Boeing rule, dissent and related matters follow:

***STANDARDS OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT* AS DELINEATED IN: *SIMLER* V. *CONNER* 372 U.S. 221 (1963) 222, Per Curiam)**

"We agree with respondent that the right to a jury trial in the

federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength. *Parsons* v. *Bedford*, 3 Pet. 433, 446—449; *Scott* v. *Neely*, 140 U.S. 106; *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537—539; *Beacon Theatres, Inc.*, v. *Westover*, 359 U.S. 500; *Dairy Queen, Inc.*, v. *Wood*, 369 U.S. 469. Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment* be achieved. In diversity cases, of course, the substantive dimension of the claim asserted finds its source in state law, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64; see *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208; *Palmer* v. *Hoffman*, 318 U.S. 109, but the characterization of that state-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to federal law."

*"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amend. VII.

RELATED MATERIAL

ATLANTIC & GULF STEVEDORES, INC. v. *Ellerman Lines Ltd* 369 U.S. 355 (1962); cf *HERON* v. *SOUTHERN PAC. CO.* 283 U.S. 91 (1931) (*HERON* cited with apparent approval by Supreme Court in *Byrd* v. *Blue Ridge Rural Elec Co-op.* 356 U.S. 525, 538,540 n 15 (1958)

DIRECTIONS FOR DIRECTED VERDICT, A Compass for Federal Courts 55 Minnesota Law Review, 903, 907-8)

BALTIMORE & C LINE v. *REDMAN*, 1935, 295 U.S. 654,657:

"The aim of the amendment (Seventh), as this Court has held is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common law distinction between the province of the Court and that of the jury, whereby in the absence of express or implied consent to the contrary, *issues of law are to be reached by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.*" citations omitted.

cf. *Dice* v. *Akron, C. & Y.R. Co.* 342 U.S. 359,363, 1953 FELA and Bailey v. Central Vermont R. Co. 319 U.S. 350,354,(that trial by jury is "basic and fundamental feature of our system of federal jurisprudence."

JACOBS v. *NEW YORK* 315 U.S. 752, 753,1942 (right to jury trial under Seventh Amendment "should be jealously guarded by the courts."

Cited in:

Farmers-Peoples Bank v. *United States* 477 F2d,752,556 6Ca,1973 re; seventh amendment trial by jury

Quoted in *Local 783 Allied Ind. Wkrs of Am.* v. *Gen. Electric*, 471 F2d 751,756, CA6,1973 (.on Union Contract, re right to trial by jury)

STANDARD OF SUFFICIENCY TO WITHSTAND DIRECTED VERDICT AS APPLIED IN SIXTH CIRCUIT UNDER *TENNANT* v. *PEORIA & P.U.RY CO* 321 U.S. 29 (FELA),1943, (supplementing *GALLOWAY* v. *United States* 319 U.S. 372,395)

[32]"The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Galloway v. United States, 319, U.S. 372,395; Atchison, T.& S. F. Ry Co. v. Toops 281 U.S. 351....No court is then justified in substituting its conclusions for those of the twelve jurors." (Tenant, at 35)

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, and not the court, which is the fact-finding body. it weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of

its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (citations omitted)That conclusion, whether it relates to negligence, causation or any other factual matter cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Rodriques v. *Del Ray Connecting Ry.* 473 F2d 819-820 CA6,1973, Fela

Wilkerson v. *McCarthy,* 336 U.S. 53,57, 1949 FELA CASE

"It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

Supreme Court may have approved the above standard in *Continental Ore Co.* v. *Union Carbide and Carbon* 370 U.S. 690,696,700-01;see *DIRECTIONS FOR DIRECTED VERDICTS,*a Compass for Federal Courts, Cooper, 55 Minn. Law Review 903,pp948-53 (note 145,p949) A similar analysis of *Wilkerson* is forcefully presented by Judge Rives' dissent in *Boeing Co.* v. *Shipman* 411 F2d 365, 381-2 5Ca,1969.

STEELE v. *Louisville & Nashville R Co* 506 F2d 315,317, CA6,1974 FELA Ohio

MILLER v. *Cincinnati, New Orleans & Texas Pac. Ry* 317 F2d 693, 700 CA6,1963 FELA

Comment: *Wright and Miller and Federal Practice and Procedure* #2529, 571-2-3 (as to Wilkerson) inferenceces generally, #2528 pp563-571

2 B W Barron & A Holtzoff, Federal Practice & Procedure #1075, at 399-400

Bagalay, *Directed Verdicts and the right to Trial by Jury in Federal Courts,* 42 Tex. L. Rev. 1053,1061 (1964

Supreme Court, U. S.
FILED
OCT 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-494

OVERSEAS MOTORS, Inc., a Michigan corporation,

Petitioner,

–vs.–

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK AKTIENGESELLSCHAFT a/k/a VOLKSWAGENWERK GmbH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, INC. (Porsche-Audi Division), a New Jersey corporation, jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-494

OVERSEAS MOTORS, INC., a Michigan corporation,

Petitioner,

vs.

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign Corporation, VOLKSWAGENWERK AKTIENGELLSCHAFT a/k/a VOLKSWAGENWERK GmbH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, INC. (Porsche-Audi Division), a New Jersey corporation, jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals appears at 519 F.2d 119. The opinion of the District Court appears at 375 F. Supp. 499.

Jurisdiction

The opinion and judgment of the Court of Appeals were entered June 2, 1975 (Appendix I, 5a, 6a). The instant petition was filed with this Court on September 30, 1975, more than 90 days thereafter. No extension of time for applying for a writ of certiorari was granted or even requested by Petitioner. Pursuant to 28 U.S.C. § 2101(c), this Court lacks jurisdiction of this matter.

Statute Involved

The statute governing the time for filing a petition for certiorari directed to a court of appeals in a civil action is 28 U.S.C. § 2101(c):

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Additional Questions Involved

1. Whether this Court has jurisdiction to entertain the instant petition filed more than ninety days after entry of the opinion and judgment of the Court of Appeals.

2. Whether the questions presented by Petitioner in this Court can be considered when they were not raised before or considered by either court below.

Statement of the Case

No detailed restatement of the facts as outlined by Petitioner will be made. This does not constitute endorsement of Petitioner's statement of facts, but rather reflects Respondents' belief that many of the facts stated, sometimes erroneously, by Petitioner are irrelevant to the instant petition. The facts are stated fully and accurately by the Sixth Circuit, 519 F.2d at 120-22.

This action was brought by Petitioner against Respondents exclusively under federal statutes, namely, the Sherman Act, 15 U.S.C. §§ 1-7, the Clayton Act, 15 U.S.C. §§ 12-27, and the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25. Diversity of citizenship did not exist between the Petitioner-Plaintiff and the Respondents-Defendants, and no state law claims were presented.

The trial of this action began on July 5, 1973 and concluded August 13, 1973. At the close of Petitioner's case, and without Respondents having offered any evidence, the District Court directed a verdict against Petitioner. The District Court and, on appeal, the Sixth Circuit, considered all evidence offered by Petitioner without regard to admissibility. 375 F. Supp. at 525; 519 F.2d at 123.

On August 22, 1973, Petitioner filed a motion for a new trial with the District Court. On March 18, 1974, the District Court issued its comprehensive opinion on the granting of the directed verdict and the denying of Petitioner's motion for a new trial.

Petitioner then appealed to the Court of Appeals for the Sixth Circuit which issued its opinion and judgment on June 2, 1975. That opinion concluded, 519 F.2d at 123:

> "A careful review of the record demonstrates that Overseas' antitrust issues were never clearly articulated and we have little to add to the extensive

discussion of the evidence made by the district judge in his memorandum opinion. Our examination of the evidence compels us to conclude, as did Judge Feikens, that plaintiff has totally failed in its proofs on the key elements of its antitrust claims:

> The overwhelming reality which emerges from the many weeks of testimony and the hundreds of exhibits in this case is the total failure of the plaintiff to even address many of the central questions raised by the law it has invoked, and its complete lack of concrete evidence as to those elements with which it has concerned itself. 375 F. Supp. at 544."

On June 17, 1975, Petitioner filed a "Petition for Rehearing In Banc" [sic] which was denied on July 10, 1975. The instant petition was filed in this Court on September 30, 1975.

ARGUMENT

I.

This Court lacks jurisdiction because the petition for certiorari was not timely filed.

Petitioner seeks review of the opinion and judgment entered by the United States Court of Appeals for the Sixth Circuit on June 2, 1975. The petition for certiorari was docketed in this Court on September 30, 1975. Ninety days after June 2, 1975, including weekend and holiday allowances, was September 2, 1975 .

Petitioner asserts (Pet. 2)[1] that the petition was timely under 28 U.S.C. § 2101(c) because it was filed less than

[1] All "Pet." references are to the instant petition for a writ of certiorari.

ninety days after the denial, on July 10, 1975, of its petition for rehearing in the Sixth Circuit. That denial reads as follows:

> "No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiff-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.
>
> Accordingly, the petition for rehearing is hereby denied." [Clerk's signature entered by order of the court.] Appendix I, 22a.

Such an order is clearly insufficient to begin anew[2] the running of the ninety day time period. As was said in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952):

> "If the court did no more by the second judgment than to restate what it had decided by the first one . . . the ninety days would start to run from the first judgment."

That proposition was thoroughly discussed and applied in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952), where the writ of certiorari was dismissed because the petition had not been timely filed.

[2] Even if the principle of *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 446 (1974) were to be applied, the petition for certiorari was not timely. The petition for rehearing, itself untimely under Rule 40(a), F.R.A.P., although dated June 14, 1975, was mailed, according to the proof of service, on June 16, 1975 and filed on June 17, 1975. It was denied on July 10, 1975 and thus was pending for 23 days, which is insufficient to make the petition timely.

It has long been established that the time requirements for a petition for a writ of certiorari to a court of appeals in a civil action are jurisdictional and that failure to comply with such time requirements precludes consideration of the petition by this Court.[3] *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U.S. 169, 177-78 (1932); *Gotham Can Co.* v. *United States,* 281 U.S. 706 (1930); *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399, 418 (1923). Consequently, Respondents respectfully submit that the petition for certiorari filed by Petitioner on September 30, 1975 was not timely, may not be considered, and should be denied.

II.

The issues sought to be presented to this Court by Petitioner were not presented to or considered by either of the courts below and, being presented for the first time to this Court, do not give support for the granting of the petition.

Petitioner seeks to present as grounds for granting certiorari the alleged issues of whether the trial court applied the correct legal standard of the sufficiency of the evidence and whether the granting of a directed verdict denied a right of Petitioner to a jury trial. Both issues are

[3] A different rule may apply in other circumstances: (a) in criminal petitions for certiorari where the time requirements are established not by statute but by Supreme Court rule which occasionally has been waived, see, *e.g., Durham* v. *United States,* 401 U.S. 481 (1971); (b) in direct appeals or petitions for certiorari to trial courts after post-trial motions, see, *e.g., United States* v. *Adams,* 383 U.S. 39 (1966) and Rule 4, F.R.A.P.; and (c) in appeals or petitions for certiorari to the highest court of a state where the local rules provide that a motion for rehearing operates as an automatic stay, see, *e.g., Department of Banking* v. *Pink,* 317 U.S. 264 (1942). Rules 35(c) and 40, F.R.A.P., and Sixth Circuit Rule 3(b) make clear that the petition for rehearing did not suspend the finality of the June 2, 1975 opinion and judgment.

spurious and need not be considered on their merits, because they were not presented to either court below, were not considered by either court, and were not otherwise preserved for review by this Court. The briefs presented by Petitioner to the Sixth Circuit make no claim that the directed verdict was inconsistent with the Seventh Amendment. The petition for rehearing is likewise silent.

Although Petitioner did complain in the Sixth Circuit regarding the granting of a directed verdict, that argument was based entirely upon the trial court's justifiable inability to interpret the facts as supporting Petitioner's claims. Petitioner did not attack in the slightest the standard under which the trial court had found the evidence to be completely lacking. Petitioner asserted repeatedly throughout its brief, reply brief, and petition for rehearing filed in the Sixth Circuit, that the trial court misapplied the relevant standards by not in fact reviewing "the evidence in the light most favorable to the plaintiff," as it said it had or by ignoring certain evidence Petitioner thought significant. Nowhere did Petitioner allege, or even hint, to the Sixth Circuit that the trial court had relied upon the wrong standard.[4] Likewise, the opinion of the Sixth Circuit makes no mention of any such issue.

The late blooming invention of this supposed issue is demonstrated by the fact that Petitioner cited favorably below the two cases which it now claims to have been error for the trial court to consider, *Teti* v. *Firestone Tire & Rubber Co.,* 392 F.2d 294 (6th Cir. 1968), and *Domany* v. *Otis Elevator Co.,* 369 F.2d 604 (6th Cir. 1966), *cert. denied,* 387 U.S. 942 (1967) (*e.g.,* Petitioner's brief to Sixth

[4] Indeed, Respondents' Brief to the Sixth Circuit pointed out at page 12: "Plaintiff does not contend that the wrong legal standard was applied. . . ." Neither Petitioner's reply brief nor any of its papers seeking rehearing disputed this statement.

Circuit at 50). The attempt to raise issues, particularly constitutional issues,[5] in this Court for the first time has been consistently rejected. *E.g., Tacon* v. *Arizona,* 410 U.S. 351, 352 (1973); *Lawn* v. *United States,* 355 U.S. 339, 362 n. 16 (1958). As stated in *Ramsey* v. *United Mine Workers of America,* 401 U.S. 302, 312 (1971):

> "We find no reference to this aspect of the case in the opinions in the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem it inappropriate to consider it in the first instance."

As is evident from the fact that the issues raised in the instant petition were not argued to or considered by the courts below, this case does not involve, and never has involved, the questions of law posed in the petition for a writ of certiorari. Accordingly, the petition should be denied.

III.

There is no conflict among the circuits regarding the applicable law, and both the District Court and the Court of Appeals applied the proper law to the evidence.

This case involves only claims under federal statutes. Federal substantive and procedural law therefore governs all aspects of the case, including the standards to be applied in determining the sufficiency of the evidence to withstand a motion for a directed verdict.

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[5] Of course, no genuine constitutional issue has been presented by Petitioner. As stated in *Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 455 (1959) (Frankfurter, dissenting):

> "If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict."

The general federal standards for the granting of directed verdicts have been clear, at least since *Brady* v. *Southern Ry.,* 320 U.S. 476 (1943). The standard enunciated in *Brady* at 479-80 is that:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Petitioner has stated (Pet. 7) that an alleged "lack of controlling guidance has left the various federal judicial circuits hopelessly split on usable tests" citing, *inter alia,* page 2330 of Professor Moore's treatise. In fact, the cited reference states:

> "The judicial authorities on the question of the proper standards for directing a verdict would seem to be pretty much in accord. The language utilized remains diverse and, occasionally, troublesome. Essentially what the cases reveal is not a difficulty of ascertaining a proper standard but a difficulty in applying the standard to the varying facts of the individual cases." (footnote omitted) 5A J. Moore, Federal Practice ¶ 50.02[1], at 2330 (2d ed. 1975).

Petitioner's other citations all involved diversity cases and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.,* neither of which is here involved. See, *e.g., Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 444-45 (1959); Cooper, *Directions for Directed Verdicts: A Com-*

pass for Federal Courts, 55 MINN. L. REV. 903, 973-76 (1971).

Petitioner's argument that the courts below applied an improper standard rests on two premises: first, that the District Court, by footnoting two cases [6] which Petitioner itself urged upon the courts below, applied an Ohio rather than a federal standard (Pet. 6, 8); and, second, that the Sixth Circuit "adopted" the District Court's opinion (Pet. 6, 16). In fact, neither premise is true.

The relevant portions of the District Court's opinion, 375 F. Supp. at 525, make clear that the court expressly adopted the federal standard of *Brady.* The citation of *Teti* was solely for the proposition that:

> "Of course it is a well-established rule that the court must view the evidence in the light most favorable to the party against whom the motion is made." 375 F. Supp. 499 at 525 n. 86.

Surely Petitioner cannot contend that it was error for the District Court to adopt this proposition, which clearly favored Petitioner and had long since been enunciated by this Court *inter alia* in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 696 (1962).

Similarly, *Domany* was cited by the District Court solely for the proposition that:

> "Thus, no rational inference favoring the plaintiff may be rejected because of conflicting evidence or inferences or questions as to a source's credibility." 375 F. Supp. at 525 n. 87.

[6] *Teti* v. *Firestone Tire & Rubber Co.,* 392 F.2d 294 (6th Cir. 1968); *Domany* v. *Otis Elevator Co.,* 369 F.2d 604 (6th Cir. 1966), *cert. denied,* 387 U.S. 942 (1967). Petitioner also claims (Pet. 8) that the District Court's citation of *Boeing Co.* v. *Shipman,* 411 F.2d 365 (5th Cir. 1969), *aff'g on en banc rehearing* 389 F.2d 507 (1968), evidences an application of an Ohio rather than a federal standard. *Boeing,* of course, applied the general federal standard of *Brady.*

Again, Petitioner surely cannot contend that it was error for the District Court to adopt this proposition, which is equally favorable to Petitioner and equally well established *inter alia* by *Continental.* The premise advanced by Petitioner that the District Court applied an Ohio rather than a federal standard is thus seen to be without foundation.

Plaintiff's second premise, that the Sixth Circuit "adopted" the opinion of the District Court, is similarly without foundation. It cannot be denied that the Sixth Circuit read and analyzed the District Court's opinion in depth and generally approved. But it is also clear that the Sixth Circuit made its own review of the law, the evidence and the application of the one to the other. As the Sixth Circuit concluded:

> "A careful review of the record demonstrates that Overseas' antitrust issues were never clearly articulated and we have little to add to the extensive discussion of the evidence made by the district judge in his memorandum opinion. Our examination of the evidence compels us to conclude, as did Judge Feikens, that plaintiff has totally failed in its proofs on the key elements of its antitrust claims."
>
> • • •
>
> "For purposes of ruling upon the motion for directed verdict, the district judge considered the proffered settlement evidence even though he was convinced it was inadmissible. We have also considered this evidence and conclude that its admission would not change the result here." 519 F.2d at 123.

Furthermore, the Sixth Circuit relied upon *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 452 F.2d 1095 (6th Cir. 1971), *cert. denied,* 406 U.S. 919 (1972), which in turn relied on *Brady* and *Continental,* as its source for a

statement of the general federal standards for directed verdicts. 519 F.2d at 122. The Sixth Circuit did not rely at all on either of the two cases which Petitioner claims tainted the District Court opinion.

Petitioner's argument, that the courts below applied an incorrect standard, is thus without merit. Both lower courts applied the general federal standards set forth in *Brady* and its progeny. Both courts concluded that Petitioner had "totally failed" in its proofs. The standard applied is not disputed among the various circuits or within the Sixth Circuit and was not even disputed by Petitioner in either court below. The petition, therefore, does not present any question of law for review, let alone a question of general importance. It merely asks this Court to use its time to review the evidence once again and to apply the proper standard to this evidence for a third time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-494

OVERSEAS MOTORS, Inc., a Michigan corporation,

Petitioner,

-vs.-

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK AKTIENGESELLSCHAFT a/k/a VOLKSWAGENWERK GmbH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, INC. (Porsche-Audi Division), a New Jersey corporation, jointly and severally,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEF

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1975 (Appendix I 5a, 6a) and mailed to Counsel for Petitioner on that date. Petition for Rehearing, (Appendix I 15a thru 21a) was mailed to Clerk on June 16, 1975 by registered mail (Proof of Service, part of certified record) and conceded in Respondents'

Brief page 5 (note 2) Pursuant to F.R.A.P. 26 (c) three days are to be added to the prescribed period to make the filing timely.

RULE INVOLVED

The rule involved for the computation of time is Rule 26 (a) and (c) F.R.A.P.

(a) "In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, Sunday or a legal holiday. . . . . "

(b) omitted

(c) "ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period."

RE-STATEMENT OF ADDITIONAL QUESTIONS INVOLVED

1. Whether this Court has jurisdiction to entertain the instant petition filed within ninety days after entry of an Order of the Court of Appeals denying Motion for Rehearing.
2. Whether the questions presented by Petitioner in this Court were raised in the Courts below.

COUNTER STATEMENT OF THE CASE

In view of the statement of Respondents "that no detailed restatement of the facts as outlined by Petitioner will be made" Petitioner would only state that the conclusion of the Respondents that the facts are "stated fully and accurately by the Sixth Circuit" is erroneous. This was pointed out in Petition for Rehearing in said court; (Appendix I 15a thru 21a) and is further

demonstrated by the record and exhibits as summarized and set forth in Petitioner's Consolidated Brief in the Sixth Circuit (P-Br 1), which is part of the Certified Record on Appeal, at pages 2 to top of page 17, 26 to top of page 28, 30 to middle page 31, bottom page 33 thru to bottom page 47, middle page 49, top page 50, 52 to middle page 57, page 64, top page 67. Further facts are summarized in Petitioner's Consolidated Reply Brief (P-Br 2) at pages 3, top page 4, middle page 5, 7 to middle page 8, bottom page 9 thru bottom page 25, middle page 28, bottom page 34-5.

The Opinion of the Court of Appeals (519 F2d, 123) was entered June 2, 1975 and was sent by mail to Counsel for Petitioner. As an officer of this Court counsel for Petitioner represents that said Opinion was received by him on June 5, 1975. The Petition for Re-hearing in the Sixth Circuit was mailed by registered mail to the Clerk of the Court of Appeals, Sixth Circuit on June 16, 1975 as appears from the Proof of Service, part of the certified record and as conceded in Respondents' Brief in this Court page 5 note 2.

The question of lack of jurisdiction was not raised in the Sixth Circuit by motion of respondents, nor was it raised by the Sixth Circuit Court of Appeals. The Petition for Rehearing was decided on the merits. The Court used the following language (Appendix I 22a): ". . .Upon consideration of said petition, the court concludes that it is without merit." The Petition for Rehearing was denied and the order was entered on July 10, 1975, and the instant petition was filed in this Court on September 30, 1975, as claimed in Respondents' Brief (middle page 4) within the prescribed ninety day period.

ARGUMENT

I.

THIS COURT HAS JURISDICTION TO HEAR THIS PETITION FOR CERTIORARI BECAUSE THE PETITION FOR CERTIORARI WAS FILED WITHIN NINETY DAYS AFTER THE ENTRY OF THE ORDER DENYING THE PETITION FOR REHEARING.

Respondents assert that the ninety day period runs from June 2, 1975, the date of the opinion and judgment of the United

States Court of Appeals and expired September 2, 1975 and was not timely; while Petitioner asserts petition was timely because it was filed less than 90 days from the denial on July 10, 1975 of its petition for rehearing in the Sixth Circuit.

The 14 days within which to file the petition for certiorari, by virtue of F.R.A.P. 26 (c) was increased to 17 days, since it provides that ". .3 days shall be added to the prescribed period," where the paper (Order Denying Motion for Rehearing) was served by mail. Therefore, the prescribed period did not expire until June 19, 1975. Respondents concede on page 5, note 2 of their Brief in this Court that Petitioner's Petition was on file in the office of the Clerk of the United States Court of Appeals two days before, viz on June 17, 1975.

Respondents cite *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.* 344 U.S. 206, 211 (1952) where writ of certiorari was dismissed because petition had not been timely filed. In *United States* v. *Adams* 383 U. S. 39, 41, (1965) footnote 2 respondents there relied on 344 U. S. 206, supra. The court held it was inapplicable since it did not involve a timely motion to amend and said in the footnote (2):

> "Where a timely motion is filed, the time in such cases runs from the date of the order overruling the motion. See *Department of Banking* v. *Pink* 317 U. S. 264, 267 (1942); *United States* v. *Crescent Amusement Co.* 323 U. S. 173, 177, (1944); *Foreman* v. *United States* 361 U. S. 416, 426 (1960).

Respondents also cited *Federal Power Commission* v. *Idaho Power Co.* 344 U. S. 17, 20 (1952). This did not involve a motion for rehearing or a motion to amend a judgment, but involved two different judgments.

In *Bowman* v. *Loperena* 311 U. S. 262, 266 (1940) the court said:

> ". . .But where the court allows the filing and, after considering the merits, denies the petition, (for rehearing) the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." (citations omitted)

To the same effect is *Gypsy Oil Company* v. *Leo Bennett Escoe* 275 U. S. 498, 499, 1927.

In *Communist Party of Indiana* v. *Whitcomb* 414 U. S. 441, 444-6, (1974) the court held:

> ". . .Appellees' motion for reconsideration of October 3, suspended the finality of the judgment of September 28 until the District Court's denial of the motion on October 4 restored it. Time for appeal thus began to run from October 4, and the notice of appeal filed November 29, was timely."

The following cases cited by Respondents, viz:

Hartford Accident & Indemnity Co. v. *Bunn* 285 U. S. 169, 177-8, (1932); *Gotham Can Co.* v. *United States* 281 U. S. 706 (1930); *Toledo Scale Co.* v. *Computing Scale Co.* 261 U. S. 399, 418 (1923), are clearly inapposite. They did not involve timely post-judgment motions or petitions for rehearings which might have suspended the prescribed appellate time, as in the instant case.

Consequently Petitioner respectfully submits that the petition for certiorari filed by Petitioner herein was timely and should be considered.

II.

THE TIME LIMITATION FOR FILING PETITION FOR CERTIORARI IS NOT JURISDICTIONAL AND IF THERE WAS A FAILURE TO TIMELY FILE, IT DOES NOT BAR THE SUPREME COURT'S EXERCISE OF DISCRETION TO CONSIDER THE CASE.

It is said in *Taglianetti* v. *U. S.* 394 U. S. 316, 1968, foot note 1:

> "Although this petition for certiorari was not filed within the 30 days allowed by the Court's *Rule 22 (2)* the time limitation is not jurisdictional, *Heflin* v. *United States* 358 U. S. 415, n 7 (1959) and does not bar our exercise of discretion to consider this case."

Durham v. *U. S. Or: 1971* 401 U. S. 481, 482

III.

THE ISSUES SOUGHT TO BE PRESENTED, CONTRARY TO RESPONDENTS' CLAIM, WERE PRESENTED TO THE COURTS BELOW.

Respondents in footnote 4 page 7, of their Brief herein refer to a reference that in its Brief to the Sixth Circuit they had made the statement that: "Plaintiff does not contend that the wrong legal standard was applied. . ."; and then asserts that Petitioner did not respond to this in its Brief, etc. We would respectfully call the Court's attention to our Consolidated Brief (P-Br 1 p. 31):

> "Judge Feiken's ruling hereunder were clearly erroneous — since there was no substantial evidence to support them and the court misapprehended the effect of the evidence; AND HE FAILED TO APPLY PROPER STANDARDS TO FACTS" (emphasis supplied)

This was expressly stated in our Brief in this Court (middle page 14) and presumably was read by Respondents.

Petitioner acknowledges it cited *Teti* v. *Firestone Tire & Rubber Co.* 392 F2d 294 (6th, 1968) and *Domany* v. *Otis Elevator Co.* 369 F2d 604 (6th, 1966) respectively as follows:

"It is well established rule that the Court must view the evidence in the light most favorable to the party against whom the motion is made." (*Teti*)

and

"Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in disposing of motion for directed verdict." (*Domany*)

However, this does not mean that Petitioner accepted those standards in toto. The excerpts are a part of all standards of sufficiency. The nitty-gritty is why the district judge applied the state of Ohio tests of sufficiency rather than the more liberal tests of sufficiency in effect in Michigan where the case was tried as argued in Petitioner's Brief herein (page 8-9). Respondents did not respond to this argument in their Brief.

As to the point raised that Petitioner made no claim in the Sixth Circuit that the directed verdict was inconsistent with the

Seventh Amendment, there are numerous references in Petitioner's Brief (P-Br 1) directly or by implication that the directed verdict was inconsistent with the *Seventh Amendment*. One issue therein was devoted to such inconsistency, (P-Br 1, p. 14, et seq) and specifically stated (P-Br 1, 17):

"The modus operandi, used by defendants to anticipate District Court trial issues and to get Findings of Facts, in the Court of Arbitration, which would bind Plantiff in the District Court, THUS FORECLOSING ITS RIGHTS TO TRIAL BY JURY, of its anti-trust issues, by application of the doctrine of res judicata and collateral estoppel therein, was the identical gambit tried without success in *Beacon Theatres Inc.* v. *Westover U. S. District et al*, 359 U. S. 500 (1958).

The standards opted by Petitioner were those of *Continental Ore Co.* v. *Union Carbide* 370 U. S. 690 (696) (P-Br 1-51) and that under that standard the jury was to be given the benefit of all inferences which the evidence properly supported even though contrary inferences might reasonably be drawn.

Other references that the directed verdict was inconsistent with right to jury trial under the *Seventh Amendment* occur at (Bot. P-Br 1, Bot. p. 18-19; P-Br 1, p. 51-55)

IV.

THERE IS CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICABLE LAW RELATING TO TESTS OF SUFFICIENCY AND THE COURTS BELOW FAILED TO APPLY THE PROPER LAW TO THE EVIDENCE.

Argument under this heading was covered in Petitioner's Brief herein pages 9 thru 16. But certain points are raised which require answer.

Counsel has cited an excerpt from *5 A. J. Moore Federal Practice* at 2330 (2nd Ed. 1975) but did not include the entire section which dealt with this confusing problem. At 2347 of the same work it is said: (50.06)

> ". . . Nevertheless the divergency among the circuits continues, while the federal courts await authoritative announcement from on high. Many cases are to be found

holding state law to be controlling. And there is equally impressive authority sustaining the supremacy of the Federal Rule. . ."

(citations omitted)

Counsel argues that the Sixth Circuit relied upon *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F. 2nd 1095 (6th Cir.)1971 (cert den. 406 U. S. 919, 1972), which in turn relied on *Brady* and *Continental* and asserts that the Sixth Circuit did not rely at all on either of two cases (*Teti and Domany*) which Petitioner claimed tainted the District Court opinion.

The standard of sufficiency to create an issue of fact for the jury must be the same in the appellate court as in the trial court.

Continental Co. v. *Union Carbide* 370 U. S. 690, 1961 n. 6
Wright and Miller Federal Practice #2524, 542-3

For the Fortner standards to be applicable in this Sixth Circuit Appeal, the Fortner standard should have been used in the district court; and if the standard used by the district court was applicable, the Sixth Circuit should have examined the appeal in the light of the standards applicable to Michigan where the case was tried, rather than the standards of Ohio. That point was covered on pages 8-9 of Petitioner's Brief herein.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the opinions and judgments of the Circuit Court of Appeals for the Sixth Circuit and of the District Court for the Eastern District of Michigan, Southern Divison.

Respectfully submitted,

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Dated: November 5, 1975